(1) Supreme Court, U.S.
FILED
No. 99 296 AUG 17 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

Petitioners,

v.

CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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237 pp

QUESTION PRESENTED FOR REVIEW

Whether "narrow tailoring" so limits any consideration of race that, in fashioning effective relief for an enduring policy of *de jure* racial segregation that has confined all public housing construction to minority neighborhoods for the purpose of keeping the housing and its tenants out of white areas, the district court cannot constitutionally order race-conscious relief that fits the violation – even to prevent the perpetuation and exacerbation of the segregation through construction of additional new public housing in minority areas?

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PETITION FOR A WRIT OF CERTIORARI

Debra Walker, Jeanette Washington, Hazel Williams, Zelma Lang, and Lillie Thompson, plaintiffs in this public housing desegregation case, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a) is reported at 169 F.2d 973. The opinions of the district court (App. 36a-65a, 66a-206a) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 16, 1999. 1a. The HUD and the Walker class representatives' petitions for rehearing were denied on May 19, 1999. App. 211a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE 29.4(b) CERTIFICATION

This petition has been served on the Solicitor General of the United States.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV (Equal Protection Clause) "nor deny to any person within its jurisdiction the equal protection of the laws."

24 CFR § 941.202(c) "The site for new construction projects must not be located in: (1) An area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area."

STATEMENT

Introduction

It is undisputed that, from its inception, Dallas Housing Authority [DHA] has intentionally kept all family public housing and most of the Section 8 voucher program housing out of white areas and confined the units to minority areas as part of its scheme of *de jure* racial segregation. App. 4a-5a. [Public housing is low-income rental housing financed by the U.S. Department of Housing and Urban Development [HUD] and owned and operated by local housing authorities such as DHA. HUD also provides funds for DHA's Section 8 certificate and voucher program (referred to as "Section 8 vouchers"), which pays private landlords a portion of the rent for low-income families. App. 4a n. 3.]

The *Walker* plaintiffs filed this suit in 1985 on behalf of a class of black public housing and Section 8 voucher program participants seeking relief under 42 U.S.C. § 1983 and alleging jurisdiction under 28 U.S.C. § 1343 for DHA's and HUD's *de jure* racial segregation in public housing and Section 8. App. 3a. In 1995, after almost a decade of proceedings that included consent decrees and their dissolutions, the addition of the City of Dallas as a defendant, and liability determinations against the City, HUD, and DHA, the district court entered a remedial order. App. 3a-4a, 5a-6a. This order requires any new public housing units developed by DHA to be constructed in predominantly white areas until the number of units in white areas balanced the number in minority areas. App. 8a.

Homeowners [Highlands of McKamy IV and V Community Improvement Association, Ginger Lee, Preston Highlands Homeowners' Association, David Beer] in predominantly white areas challenged the development of units pursuant to the court order and sought to keep public housing and public housing residents out of white areas. App. 2a, 58a. The Homeowners' expert outlined the basis for this part of their claim: public housing is too costly and too intrusive for use in white areas and therefore should be built only for those who want to live in minority areas, where it is not intrusive, he said. He testified that public housing is not intrusive in minority areas because there is already public housing there and because property values are lower – there are fewer $300,000 homes. Minority families who want to live in white areas should have to use vouchers, not public housing according to the Homeowners' less intrusive

remedial plan. However, under cross examination, the expert admitted that this less intrusive plan would not remedy the segregation in DHA's programs. App. 58a, 106a.

Instead of public housing being built in white areas, the Homeowners argued that the remedy should rely entirely on Section 8 vouchers. The Homeowners promised that low-income tenants would be welcomed with open arms into their single family residential areas – if only they would use Section 8 instead of public housing to get there. But the Homeowners knew that homes in their subdivisions do not lease for rates within the Fair Market Rent or 120% of Fair Market Rent levels which can be paid by Section 8. The Homeowners also knew that the owner of the new multifamily complex immediately south of their neighborhood refused to participate in the Section 8 program. App. 145a, 196a.

The district court held that a race-conscious site selection remedy was necessary to serve the compelling interest of remedying the decades of deliberate exclusion of public housing from white areas. The Fifth Circuit agreed that the remedy served a compelling governmental purpose but held that it was not narrowly tailored and therefore unconstitutionally infringed on the Homeowners' interests. According to the court of appeals: 1) "other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing," and 2) Section 8 vouchers could be reformed in the future to be "given a fair try to prove their potential to desegregate." App. 19a, 22a, 27a.

Facts

The district court found, and the Fifth Circuit agreed, that from the inception of the Dallas public housing program in 1937 and the Section 8 program in 1974, through at least 1989, these programs operated on a basis of *de jure* racial segregation. DHA's use of overt racial classifications to keep public housing out of white areas as part of its *de jure* segregation is not contested. The court of appeals said:

> The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation. See generally Walker III, 734 F. Supp. at 1293-1312 (recounting in detail the history of public housing in Dallas). Virtually all non-elderly public housing units were constructed in minority areas of Dallas. No new public housing units were built between 1955 and 1989 at least in part for fear that they might be located in white areas. Tenant selection and assignment procedures for public housing units were crafted and administered to maintain racially segregated projects. DHA's Section 8 housing programs were operated to discourage blacks from moving into white areas of metropolitan Dallas. See id. Blacks were purposefully segregated for decades into either Section 8 housing in minority areas of Dallas or predominantly black housing projects in minority areas of Dallas. App. 4a-5a.

DHA has never placed a family public housing unit in a white area except by court order. App. 92a, 107a. DHA initially violated the previous court order in this case to locate 100 units in a white area. App. 6a. In 1995, when the DHA remedial order was entered, only 300 of

DHA's 6,400 public housing units were in white areas. As a result of the order, one new 75 unit development has been built in a white area. App. 4a n.4.

A primary cause of DHA's overtly segregated site selection decisions has been the opposition of white area residents and neighborhood associations to the placement of public housing in "their" neighborhoods. The opposition continues to exist as a barrier to desegregation. App. 44a-47a, 57a, 92a, 105a.

The district court considered alternatives to a race-conscious remedy, including race-neutral selection criteria and total reliance on the Section 8 voucher program. The district court examined the history of site selection, the remedial proposals previously submitted to the court, the obstruction, noncompliance and delay under previous court orders, the demographics of Dallas, and the neighborhood and political opposition to public housing in white areas. Based on all these factors, it determined that a color-blind alternative would not result in desegregation of DHA's public housing sites. "Absent a court order requiring the construction of public housing in white areas, the housing either is developed in minority areas or is not developed at all." App. 91a-92a. The district court further found that neighborhood and political opposition to public housing in white areas posed the most significant barrier to desegregated placement of DHA's units. App. 40a, 44a-47a, 57a, 92a, 105a.

The district court considered all of the evidence with respect to the proposal to use the Section 8 voucher program as the exclusive means of providing class members with access to predominantly white areas. App.

140a-141a, 144a-152a, 164a-165a. In findings that were explicitly left intact by the Fifth Circuit, the district court found that substantial impediments still exist to the exclusive reliance on Section 8 vouchers as the means of providing class members with housing in predominantly white areas. App. 24a.

The U.S. Departments of Justice and Housing and Urban Development support the district court's race-conscious site selection remedy. App. 10a, 24a, 104a.

The Homeowners will not suffer a direct injury from the remedial order. The Homeowners will not be denied housing, subjected to racial segregation, denied the benefits of interracial association, or subjected to inferior municipal services or facilities. The racial classification in the remedy will not be used to exempt the planned units from any zoning or building code standards that would apply to privately owned units in the same location. App. 70a-71a.

Rather, the injury that the Homeowners fear is a possible loss in property values that they claim would result if DHA mismanaged the units once they were built. This fear – arising out of the risk that DHA might continue its neglect of public housing and cause deterioration of the neighborhoods – was the interest on which the Fifth Circuit based its decision that the remedy was not narrowly tailored. App. 12a, 34a.

The district court analyzed all of the evidence presented on the effect of small scale public housing projects such as the 40-unit complexes proposed for these sites on adjoining property values. App. 122a-133a. The district court found that any actual injury to property values

would be minimal and diffuse. App. 204a. The Fifth Circuit did not overturn any of the relevant fact findings; rather, it noted that the district court had shown "considerable sensitivity" to the Homeowners' concerns and had "ordered stringent criteria for the design and upkeep of the projects and for tenant selection here and in another 'predominantly white' neighborhood. . . . " App. 23a.

The public housing developed under stringent criteria will be markedly different from the public housing in minority areas. App. 88a-89a. The remedial order requires DHA to submit a plan for achieving and maintaining in all DHA projects conditions that are substantially equal to the conditions in the HUD-assisted projects located in white areas. App. 88a, 224a. The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units. App. 89a.

DHA will build 40 units or less on each of the two sites at issue, making these developments a fraction of the size of existing minority area projects, which have from 100 to 950 units. App. 88a. [DHA's project in West Dallas – a minority area – originally had 3,500 units making it the second largest public housing project in the United States. App. 5a n.5]

DHA will build these units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style used for projects built in the minority neighborhoods will not be used. App. 89a. The units will be built to City code standards and within the existing zoning requirements. App. 70a, 123a, 172a. Adjoining and

nearby property owners have the opportunity to provide guidance and input into both the design and management of the new projects. DHA has established higher admissions and occupancy standards for the tenants who reside in the new public housing units than in the other projects. App. 88a.

The Fifth Circuit found the race-conscious site selection remedy unconstitutional as not narrowly tailored. The remedial order was vacated and remanded. The appellate stay against public housing construction on the sites was continued until entry of a new remedial order. App. 34a, 35a.

REASONS FOR GRANTING THE PETITION

This Court should settle the legal question of the constitutionality of the race-conscious site selection remedy because of the national housing and civil rights policy implications of the Fifth Circuit opinion. There is inconsistent treatment of the use of racial classifications to prevent segregation in public housing site selection decisions among various Circuits. The Fifth Circuit's decision was reached in conflict with this Court's well-established principles for eradicating *de jure* racial segregation and for evaluating the constitutionality of race-conscious remedies.

1. The Fifth Circuit declared the race-conscious public housing desegregation remedy unconstitutional. National policy, enforced through a HUD regulation, supports and requires the use of a similar race conscious public housing site selection procedure. This Court

should settle the important legal issue of the constitutionality of race-conscious public housing site selection as a remedy for *de jure* segregation because of the national housing and civil rights policy implications of the Fifth Circuit opinion.

In 1976, this Court announced that a race-conscious remedial order "directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy." *Hills v. Gautreaux*, 425 U.S. 284, 301 (1976). As the Fifth Circuit pointed out, the question of strict scrutiny as applied to a specific remedy was not before the Court in *Gautreaux*. App. 21a n.20. Nevertheless, the "well-established federal housing policy" and HUD regulation referred to in *Gautreaux* are directly involved in the issues in this case. *Gautreaux*, 425 U.S. at 301-302.

The current regulation is 24 CFR § 941.202(c). The district court remedial order declared unconstitutional by the Fifth Circuit is similar to the regulation. App. 104a.

The Remedial Order Affecting DHA requires that DHA:

> A.3. Develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas. These units shall be in place and occupied before any non-family units or any units in non-predominantly white areas are developed. App. 214a.

The order requires the use of white areas. The regulation severely limits the use of minority areas for public housing.

The national policy that racial characteristics of geographic areas must be taken into account to prevent further racial segregation in site selection decisions under federally assisted housing and community development programs has been applied in a variety of cases. *NAACP v. Secretary*, 817 F.2d 149, 155-156 (1st Cir. 1987). HUD's race-conscious site selection regulation controlled site selection decisions in the Chicago Housing Authority desegregation case even though the regulations were not part of the actual decree. *Gautreaux v. Pierce*, 690 F.2d 616, 636-637 (7th Cir. 1982). The regulation is consistently invoked to contest the segregated placement of publicly assisted housing in minority areas. *Jackson v. Okaloosa County*, 21 F.3d 1531, 1538 (11th Cir. 1994); *Shannon v. HUD*, 436 F.2d 809, 821-822 (3rd Cir. 1970); *Glendale Neighborhood Association v. Greensboro Housing Authority*, 901 F. Supp. 996, 1003 (M.D.N.C. 1995); *Cornwallis Owners Association v. Durham Housing Authority*, 894 F. Supp. 236, 240-241 (M.D.N.C. 1995); *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 642-643 (D.R.I. 1991). The national policy continues to be applied in race-conscious site selection provisions of other public housing desegregation orders. *U.S. v. Yonkers Board of Education*, 837 F.2d 1181, 1236-1237 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Gautreaux v. CHA*, 4 F. Supp. 2d 757, 759 (N.D. Ill. 1998); *Sanders v. HUD*, 872 F. Supp. 216, 218-219, 242 (W.D.Pa. 1994).

The application of narrow tailoring to the remedial order against DHA in the circumstances presented by this case clearly has the potential to affect the application of

the HUD regulation and national policy throughout the country. The federal public housing program has been and continues to be racially segregated as a result of local and federal executive policies and practices. *Cohen v. Public Housing Administration*, 257 F.2d 73 (5th Cir. 1958); *Gautreaux v. Romney*, 448 F.2d 731 (2d Cir. 1971); *Clients Council v. Pierce*, 711 F.2d 1403 (8th Cir. 1983); *Young v. Pierce*, 628 F. Supp. 1037, 1044-1047 (E.D. Tex. 1985), *rev'd in part*, 822 F.2d 1368 (5th Cir. 1987); *Jaimes v. TMHA*, 833 F.2d 1203 (6th Cir. 1987); *Jaimes v. TMHA*, 715 F. Supp. 835, 841-842 (N.D. Ohio 1989). The legal issues raised by the Fifth Circuit's application of narrow tailoring to a race-conscious procedure similar to the one deemed necessary by the HUD regulation and supported by national policy should be settled by this Court.

2. This Court should grant the petition to address the difference between the Fifth Circuit decision and the decisions of other circuit courts of appeals on the issue of the use of racial classifications in site selection decisions for HUD assisted low-income housing units.

The Fifth Circuit's decision precludes the use of the "predominantly white" racial classification to place public housing in white areas as a remedy for de jure racial segregation at least until race-neutral procedures have been tried. The Seventh Circuit specifically approved a public housing desegregation consent decree requiring the development of low-income housing outside predominantly minority areas. The court held that HUD's race-conscious site selection regulation would control the placement of housing under the decree. No exhaustion of race-neutral remedies was required. *Gautreaux v. Pierce*,

690 F.2d at 622-623. The Second Circuit held that a remedy requiring construction of 200 units in the predominantly white area of Yonkers was closely tailored to the violation and necessary to achieve some correction of the imbalance caused by Yonkers' confinement of all assisted housing in the minority area. The remedy approved was the district court's order that "the City provide sites for 200 units of public housing in nonminority areas. . . . " No exhaustion of race-neutral procedures was required. *Yonkers*, 837 F.2d at 1184, 1236.

The Second, Third, and Seventh Circuits have ruled that HUD assisted low-income housing site selection decisions must be based on an explicit consideration of the racial composition of the area in order to avoid perpetuating racial segregation. These cases apply the use of racial classifications to individual site decisions without requiring exhaustion of race-neutral efforts. *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973); *Shannon*, 436 F.2d at 821-822 (3rd Cir. 1970). "As part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating segregation." *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982).

The Fifth Circuit's decision is inconsistent with these cases that require the consideration of race and the use of race-conscious site selection criteria to prevent further segregation of federally assisted public housing.

3. The Fifth Circuit's decision prohibiting the use of race-conscious site selection conflicts with the decisions of this Court that require all remedies, race-conscious or

race-neutral, fit the violation. *U.S. v. Paradise*, 480 U.S. 149 171-172, 196 (1987).

In this case, DHA, the City, and HUD intentionally imposed decades of public housing segregation through the use of "Negro", "Mexican", "black", "Hispanic", "minority", and other neighborhood and tenant racial classifications. App. 4a-5a, 52a, 67a, 73a-80a; *Walker v. HUD*, 734 F. Supp. 1289, 1293-1297, 1301-1302, 1311-1312 (N.D. Tex. 1989). These classifications were used to put all 6,100 of DHA's family public housing units in minority areas. App. 4a n.4. The use of "predominantly white" in the remedial order fits the compelling governmental purpose of eliminating the existing segregated public housing patterns and preventing future *de jure* segregation. The race-neutral and Section 8 alternatives imposed by the Fifth Circuit will not achieve the constitutionally required result – public housing distributed in a non-segregated pattern.

A race-neutral site selection criteria will leave predominantly black and other minority concentrated areas eligible for the development of the already allocated public housing units. The percent of poverty standard suggested by the Fifth Circuit certainly does so. There are 16 Dallas County census tracts with a majority-minority population and a poverty rate less than the county average. There are an additional seven tracts with a non-Hispanic white population between 50% and 63% and a poverty rate less than the county average. App. 33a n.38. The existing neighborhood and political opposition will continue to pressure DHA's decisions on sites away from white areas and into the minority areas left open. App.

44a-47a, 92a. Building public housing in these neighborhoods would neither prevent future violations nor remedy the past segregation.

The Section 8 voucher program does not fit the violation. DHA's Section 8 voucher program itself is still substantially segregated. When the 1995 DHA remedial order was entered, only 21% of DHA's black Section 8 households resided in predominantly white areas as opposed to 45.6% of DHA's white Section 8 households. App. 86a. The 21% had increased to 24% by the hearing on the Homeowners' challenge. App. 100a. The district court found that a host of barriers – racial discrimination by landlords, lack of available units at Section 8 rents, and discriminatory application and selection procedures – still hamper the use of Section 8 vouchers in white areas. App. 140a-141a, 144a-147a, 148a-153a, 164a-165a. The Fifth Circuit found that significant reforms and additional resources were necessary if Section 8 vouchers were to provide many more desegregated housing opportunities. App. 23a n.23, 26a-27a, 34a. The Section 8 voucher program, as a present remedy for public housing segregation, leaves the discriminatory public housing system in place and offers a different and unequal system as the option. Section 8 vouchers do not fit the public housing violation. *U.S. v. Virginia*, 518 U.S. 515, 534, 541-543, 547-548 (1996).

There can be no dispute that the race-conscious site selection remedy in this case fits the violation by being directly related to the violation. It will prevent future segregated placement of public housing and bring about a pattern of public housing placement that would have

existed absent the segregationist use of racial classifications. DHA deliberately kept public housing out of white areas; the remedy directs DHA to put the housing into those same areas. There is no doubt that the remedy will work; court orders are the only reason that any public housing exists in any predominantly white Dallas neighborhoods. App. 80a-81a, 92a, 107a. The 40-unit projects at issue in this case would have been built in white areas but for the Fifth Circuit's construction stay. The order to build public housing in white areas makes an exact fit between the location of the violation and the location of the remedy. *Shaw v. Hunt*, 517 U.S. 899, 915-916 (1996).

This Court already held that a remedy for public housing segregation can be tailored to place new housing throughout the geographic housing market from which public housing had been unlawfully excluded. *Gautreaux*, 480 U.S. at 299-300. The Second Circuit upheld a district court's determination that an order to build federally funded low-income housing only outside of minority areas of Yonkers, N.Y., fit as a remedy for *de jure* segregation in public housing placement. *U.S. v. Yonkers Board of Education*, 837 F.2d 1181, 1184, 1236-1237 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

The race-conscious, "predominantly white" remedial site selection criteria at issue is framed to address the exact effect and harm of the segregationist, race-conscious, "predominantly minority" site selection policy. The exact effect and harm to be remedied is the segregated placement of the present public housing. The "predominantly white" site selection remedy will replace the segregated placement with housing throughout the community. This is as precise and as close a fit as is possible.

Wygant v. Jackson Board of Education, 476 U.S. 267, 280 n.6 (1986).

The district court's site selection order is the only order that fits the violation. Neither the race-neutral but unspecified site selection criteria nor the reformed Section 8 program alternatives ensure the desegregated placement of future public housing units. Any remedial proposal that does not address the unconstitutional conditions is not an adequate alternative to the use of the race-conscious remedy. *Paradise*, 480 U.S. at 171-172, 196. Whether or not DHA and the other defendants are now acting in good faith, App. 29a, is irrelevant to the scope and fit of the remedy needed to eliminate the vestiges of prior *de jure* racial segregation. *U.S. v. Fordice*, 505 U.S. 717, 728 (1992), reversing *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990). Strict scrutiny does not bar the race-conscious remedies necessary to eliminate racial discrimination. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995).

4. The Fifth Circuit's decision conflicts with the decisions of this Court, including *U.S. v. Paradise*, which require a disproportionate adverse effect upon or a trammeling of the legitimate interests of innocent third parties before striking down a race-conscious remedy.

The harm feared by the Homeowners and accommodated by the Fifth Circuit is not an injury directly inflicted by the remedial order. No Homeowners will lose their house through eminent domain proceedings. No Homeowners will be removed from or lose their place on a waiting list for public housing. No zoning or housing code standards are being lowered. No restrictive covenants are violated. No white or black person is being

subjected to segregation or exclusion from the area. There is no unequal provision of unequal municipal services. The Homeowners will suffer economic injury only if DHA violates the stringent measures adopted by the district court and implemented by DHA to avoid adverse impact and the housing market reacts to those violations by lowering their property values. Any injury to property values will, as the district court found, be diffuse and minimal. App. 60a-61a, 122a-123a.

The Fifth Circuit's prohibition on the use of race-conscious public housing site selection because of the fears of Homeowners in predominantly white areas sets a new and drastically lower limit on the scope of remedies for constitutional violations than is permissible under this Court's decisions. The Fifth Circuit's adoption of this new standard for impermissible impact on third parties conflicts with this Court's decisions that only disproportionate harm to the interests of innocent individuals or the unnecessary trammeling of the rights of innocent individuals can invalidate a race-conscious remedy under the narrow tailoring analysis. *Paradise*, 480 U.S. at 183-184; *Teamsters v. U.S.*, 431 U.S. 324, 365-366, 372, 374-376 (1977); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 448, 480-481 (1986). *Cf. Virginia v. U.S.*, 518 U.S. 515, 541-543, 555-556, 556 n.20 (1996). The Fifth Circuit compounded the conflict with this Court's decisions by ruling that the district court's "stringent measures" to prevent any harm did not show narrow tailoring. App. 33a-34a. This completely reverses the law. The measures designed to prevent any unfair impact on innocent third parties show narrow tailoring, not its absence. *Paradise*, 480 U.S. at 182.

5. The Fifth Circuit could reach its decision in this case only by improperly limiting the scope of the district court's discretion to choose a remedy after balancing the competing interests within statutory and constitutional limitations. The Fifth Circuit's restrictions on the district court's authority conflict with relevant decisions of this Court. *U.S. v. Paradise*, 480 U.S. at 183-184; *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995).

The role of the appellate courts is limited to determining whether a district court's judgment that a specified remedy is necessary to cure a violation of equal protection is an abuse of discretion. The district court has the power and the duty to balance the competing interests within appropriate constitutional limits and render a decree that will, so far as is practical, eliminate the effects of past discrimination and bar like discrimination in the future. The balancing is committed to the sound discretion of the trial court. *U.S. v. Paradise*, 480 U.S. at 183-184. Of course, the discretion must be exercised within constitutional limits. *Missouri v. Jenkins*, 515 U.S. at 89. But the district court is in the best position to judge the effectiveness of an alternative remedy and to weigh the various factors involved in the narrow tailoring inquiry required for race-conscious remedies. *Paradise*, 480 U.S. at 183-184.

The court of appeals breached the allocation of respective powers and duties. For example, the district court balanced the feared injury with the steps taken to prevent the harm. App. 88a-89a. The Circuit admitted there were stringent criteria to prevent adverse impact but refused to take them into account on the grounds that the preventive measures served to add credibility to the Homeowners' fears. App. 34a. The district court balanced

the 285 black families who used Section 8 vouchers to move to white areas between 1994 and 1996 against the fact that after nine years of remedial efforts, only 24% of all black Section 8 families had been able to move to white areas. App. 99a-100a. The Circuit considered only this two-year statistic and found it dispositive on the issue of whether a race-conscious remedy was necessary. App. 24a-25a. The district court provided a specific means to allow Section 8 vouchers to substitute for future allocations of public housing in white areas once the defendants could show that Section 8 would ensure housing in white areas. App. 114a-115a. The Fifth Circuit deleted the race-conscious remedy for all present and future allocations of new public housing even while its opinion pointed out the need for major reforms to the Section 8 program if it were to serve as an alternative to public housing in white areas. App. 19a, 22a, 24a n.23, 26a-27a, 34a.

The appellate court ignored a factor crucial to any decision on the necessity of race-conscious site selection, namely, the long record and present existence of neighborhood and political opposition to public housing in white areas. App. 44a-47a. The effect of this opposition on the implementation of a public housing desegregation case can be formidable. *Spallone v. United States*, 493 U.S. 265, 274, 287 (1990). The district court took the history of opposition into account. App. 44a-47a.

The Fifth Circuit's only support for the efficacy of a race-neutral remedy is an assertion that a criterion based on poverty percentages will eliminate all minority sites from consideration and thus "ensure the desegregated construction or acquisition of any new public housing."

App. 22a, 27a n. 31a. Yet, elsewhere in the opinion, the Circuit contradicts itself, citing with apparent approval the fact that 16 census tracts are majority minority and meet the poverty criterion. App. 32a n. 38. Construction or acquisition of new public housing in these minority areas will not ensure desegregation.

The district court made specific findings, uncontested and not overturned, that DHA historically segregated Hispanics by race and that public housing was built in Hispanic areas to keep it out of white areas. App. 41a; *Walker*, 734 F. Supp. at 1293, 1296. The Fifth Circuit apparently overlooked these findings and mistakenly stated that there was no suggestion in the record of the case that liability based on discrimination against other minorities could ever be found. App. 32a. Based on this misapprehension of the record, the Fifth Circuit held that the relationship of numerical goals to the relevant demographic factors did not support narrow tailoring of this remedy. App. 32a. In fact, as found by the district court, the defendants did use non-black but still minority areas to keep public housing out of predominantly white areas. The remedial goal of placing public housing in predominantly white areas directly matches this violation.

Throughout its opinion, the Fifth Circuit characterizes the post-1995 remedial order Section 8 voucher program as "race-neutral" and poses the results achieved by this "race-neutral" program against the need for a race-conscious program. "If Section 8, combined with such assistance programs, is an effective desegregation tool, then Section 8 is superior to a race-conscious remedy in that it allows market forces and personal preferences

rather than racial criteria to guide the homemaking decision." App. 23a-24a. "Section 8, a race-neutral remedial measure, is increasingly successful at moving black families into white areas . . . When Section 8 has evidenced such promising results, options such as these should be explored and tested before adopting a race-conscious remedy as a last resort." App. 26a-27a.

But the post-1995 Section 8 mobility program that accomplished these results is explicitly race-conscious. This Section 8 program, which replaced a previous race-neutral program, includes mobility services for black households only and is focused solely on helping these families find housing in predominantly white areas. App. 56a, 90a-91a, 99a-100a, 113a-114a.

In the Fifth Circuit opinion, some class members' preferences for Section 8 counts in favor of race-neutral remedy but other class members' preference for public housing counts against a race-based site selection criterion. App. 22a, 30a. The Fifth Circuit takes into account the risks to the Homeowners of DHA failing to properly build, maintain, and manage the projects. App. 33a. But the risks to the class members from DHA failing to properly administer the Section 8 vouchers or to administer a race-neutral site selection program are discounted because the Circuit finds that DHA, the City and HUD are all cooperating defendants. App. 28a. In contrast, the district court even handedly evaluated the risks and preferences. App. 59a-64a, 117a-121a.

The Fifth Circuit's lack of familiarity with the realities of the case is apparent. One reason the district courts

have the responsibility for the consideration and balancing necessary to arrive at an effective remedy is the closer familiarity of those courts with the facts, the defendants, the community, and the other realities of the case. The district court in this case was clearly in better touch with the actual environment in which the remedy will be implemented. The district court, not the Fifth Circuit, was in the better position to judge whether alternative remedies would be effective in ending the discriminatory practices. *Paradise*, 480 U.S. at 184; *NAACP v. Yonkers Board of Education*, 29 F.3d 40, 44 (2d Cir. 1994), *cert. denied*, 515 U.S. 1157 (1995). The district court's determination should not have been disregarded by the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11083

DEBRA WALKER, ET AL,

Plaintiffs,

DEBRA WALKER; JEANETTE WASHINGTON; HAZEL WILLIAMS; ZELMA LANG; RENITA BROWN; LILLIE THOMPSON,

Plaintiffs-Appellees,

TRACEY SMITH,

Intervenor Plaintiff-Appellee,

versus

MESQUITE TX. CITY OF, ET AL,

Defendants,

DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

Defendant-Appellee.

HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INCORPORATED; DAVID BEER,

Plaintiffs-Appellants,

versus

THE HOUSING AUTHORITY OF THE CITY OF DALLAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Mar. 16, 1999)

Before JONES, SMITH, Circuit Judges, and SHAW*, District Judge.

EDITH H. JONES, Circuit Judge:

The Dallas Housing Authority (DHA), the United States Department of Housing and Urban Development (HUD), and the City of Dallas were found liable several years ago for unconstitutional racial discrimination and segregation within Dallas's public housing programs. The primary issue on this appeal is the constitutionality of the provision of the district court's most recent remedial order that directs newly constructed units of public housing to be located in "predominantly white" Dallas neighborhoods.

Specifically, this is an appeal from a final judgment in two actions that were consolidated for trial. In the first action, two homeowners and their homeowners' associations ("Homeowners") sought declaratory and injunctive relief against DHA's construction of two new public housing projects adjacent to their neighborhoods.[1] The Homeowners challenged the remedial order's provisions for new public housing construction and race-conscious

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* District Judge of the Western District of Louisiana, sitting by designation.

[1] The two homeowners' associations are: (1) Highlands of McKamy IV and V Community Improvement Association and (2) Preston Highlands Homeowners' Association, Inc.

site selection alleging that these were not narrowly tailored to remedy the vestiges of past discrimination and segregation. In the second action, the original class plaintiffs, tenants in the public housing programs, sought declaratory relief that the remedial order provisions are constitutional. The district court entered judgment against the Homeowners in the first action and for the class plaintiffs in the second action. The Homeowners appealed. We essentially vacate and remand for further consideration by the district court.

I. BACKGROUND

Part of the convoluted history of this case is concisely recounted in *Walker v. HUD*, 912 F.2d 819, 821-25 (5th Cir. 1990) [hereinafter *Walker IV*]. We will not repeat that history here, but some important procedural and substantive gaps in this court's prior opinion, which addressed different issues, should be filled in.

This case began in 1985 and initially resulted in a consent decree, which was approved by the district court in 1987. *See Walker v. HUD*, 734 F.Supp. 1231, 1247-82 (N.D.Tex.1989) [hereinafter *Walker I*] (reprinting the district court's 1987 consent decree and its "Findings of Fact & Conclusions of Law Approving the Proposed Consent Decree"). The consent decree addressed the plaintiff class's[2] challenge under the Equal Protection Clause of

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[2] The consent decree defined the plaintiff class as "all black persons presently or who during the pendency of this Decree become either (a) residents of a DHA owned or managed project, or (b) participants in the DHA Section 8 Existing

the Fourteenth Amendment and 42 U.S.C. § 1983 to the purposeful racial discrimination and segregation within DHA's public housing programs. The defendants were DHA and HUD. The City of Dallas was joined as both a defendant to the lawsuit and a party to the consent decree in 1989. *See Walker v. HUD*, 734 F.Supp. 1289 (N.D.Tex.1989) [hereinafter *Walker III*]. The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation. *See generally Walker III*, 734 F.Supp. at 1293-1312 (recounting in detail the history of public housing in Dallas). Virtually all non-elderly public housing units[3] were constructed in minority areas of Dallas.[4] No new public housing units were built between 1955 and 1989 at least in part for fear that they might be located in white areas. Tenant selection and assignment procedures for public housing units were crafted and administered to maintain racially segregated

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Housing Program." *See Walker I*, 734 F.Supp. at 1263.

The plaintiff class will be referred to throughout this opinion as the "Walker plaintiffs." Deborah Walker is one of the named plaintiffs representing the class.

[3] "Public housing units" refer to housing units owned and operated by DHA. In contrast, under DHA's Section 8 certificate and voucher programs, participants rent housing units from private owners, and their rents are subsidized by DHA.

[4] In 1994, of DHA's approximately 6,400 public housing units, 6,100 were in minority areas and 300 were in predominantly white areas. An additional 75 units are currently under construction or just completed in a predominantly white area (Frankford & Marsh project), and the units at issue in this lawsuit would add another 80 units to predominantly white areas of Dallas.

projects. DHA's Section 8 housing programs were operated to discourage blacks from moving into white areas of metropolitan Dallas. *See id.* Blacks were purposefully segregated for decades into either Section 8 housing in minority areas of Dallas or predominantly black housing projects in minority areas of Dallas.

The 1987 consent decree required the demolition of approximately 2,600 units of public housing in DHA's West Dallas project, a public housing development located in a predominantly black area of the city and referred to by this court as "one of Dallas's worst slums."[5] *Walker IV*, 912 F.2d at 821. These units were to be replaced on a one-for-one basis with additional public housing units and Section 8 certificates and vouchers. *See id.* at 822. The decree also required that one hundred

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[5] The West Dallas project was completed in 1955 and contained 3,500 units. In many ways, it is at the heart of this litigation. It was constructed to solve the "Negro housing problem." *See Walker III*, 734 F.Supp. at 1295. It is the second largest public housing project in the United States. *See id.* at 1296 n. 21. As of 1983, one-third of its units were so dilapidated as to be uninhabitable. *See id.* at 1307. In 1986, rejection rates for available units in the West Dallas project ranged from 58-60%. *See id.* at 1308. At that time, there were 1,583 vacant units of which 1,300 had been boarded up for more than ten years because of their deteriorated state. *See id.* The 1987 consent decree was designed to alter this concentration of public housing by requiring the demolition of all but approximately 900 of the West Dallas units, the reconfiguration and rehabilitation of the remaining units, and the creation of new public housing opportunities in predominantly white areas of the city and its suburbs.

newly constructed replacement units be built in a predominantly white area of Dallas, that a nondiscriminatory tenant selection and assignment plan be implemented, and that a Section 8 mobility plan be established to assist black families joining the Section 8 program in finding housing in white areas of Dallas.[6]

DHA repeatedly violated the 1987 consent decree. First, it resisted the construction of the 100 units of new public housing in a predominantly white area. *See Walker I*, 734 F.Supp. at 1243-45. Site selection for and construction of the 100 units was eventually completed, but only by court order. *See id.* Second, DHA violated the tenant selection and assignment and mobility provisions of the decree. *See id.* at 1235-42. DHA failed to establish and fund the required Section 8 mobility program, failed to

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[6] The Section 8 mobility program was designed to educate landlords about the Section 8 program and to assist Section 8 participants in locating Section 8 housing in non-minority areas of Dallas. Specifically, the program was to include landlord recruitment, exceptions to HUD's "fair market value" rent caps on Section 8 vouchers and certificates, Title VIII enforcement actions, and child care and transportation services. The program was also to provide neighborhood specific information on crime rates, job training and employment opportunities, day care, medical facilities, neighborhood shopping, transportation, social services, objective indicators of school quality such as TAAS test results, and "environmental hazards or other conditions inimical to family life."

timely obtain fair market exception rents,[7] delayed implementing a nondiscriminatory tenant selection and assignment program, failed to include in Section 8 housing information a full list of all Section 8 units available in non-minority areas, and failed to use all of the Section 8 certificates and vouchers allocated by HUD to DHA. *See id.*

In March 1992, the district court vacated the 1987 consent decree on the grounds that its terms were not implemented and that the vestiges of purposeful segregation persisted. Subsequently, the district court granted the Walker plaintiffs' uncontested motion for summary judgment on the issue of liability. In September 1994, the district court held a trial on the issue of a remedy. The district court entered its remedial order affecting DHA in February 1995 and its remedial order affecting HUD in April 1996.

The remedial order affecting DHA requires DHA (1) to demolish at least 2,630 units of its West Dallas project, (2) to develop 2,807 replacement units for the demolished West Dallas units through both new construction and Section 8 vouchers and certificates,[8] (3) to develop, either

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[7] The value of a Section 8 voucher or certificate is capped by HUD at the "fair market rent." This cap, however, can be increased by special application to HUD.

[8] These 2,807 units have already been funded by HUD. The 2,807 units are made up of 774 new public housing units and 2,033 Section 8 certificates and vouchers. Specifically, the replacement units consist of (i) the 100 units constructed pursuant to court order from the 1987 consent decree, (ii) 1,335 Section 8 certificates and vouchers previously funded by HUD, (iii) 339 new public housing units allocated to DHA in 1990 and

through construction or acquisition, an additional 3,205 new units of public housing in predominantly white areas of metropolitan Dallas in which the poverty rate does not exceed 13%, and (4) to develop *all* new public housing units in predominantly white areas until there are as many units in predominantly white areas as there are in minority areas.[9] A "predominantly white area" is defined as less than 37% Hispanic, black, or other minority. The required 3,205 new units may be satisfied by the use of Section 8 certificates or vouchers, but only after court

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1991 as part of the proposed 2,000 unit West Dallas project, (iv) 335 new public housing units allocated under HOPE VI in 1994 as replacement units for West Dallas, and (v) 698 additional Section 8 vouchers promised by HUD. Therefore, there are 674 new units of public housing currently funded but not under construction. Eighty of these units are specifically at issue in this case.

[9] The source of this final detail of the district court's remedial order is unclear. The written order itself is confusing. Paragraph A.3 requires that all of the 3,205 new units be built in predominantly white areas.

In slight contrast, the district court reiterates throughout his oral and written opinions that all of the 674 new units of public housing (*i.e.*, the ones currently funded by HUD but not under construction) "and any other allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas." 10/6/97 Written Opinion, at 22. The district court goes on to say, "The race conscious site selection remedy is limited. It applies only until there is a comparable number of public housing units in white and minority areas." *Id.* at 22-23; *see also* 8/25/97 Oral Opinion, at 22 ("Again, the 674 units must be placed in white non-minority areas until there are as many public housing units in white areas as in minority areas.").

approval.[10] The construction costs for 674 of the 2,807 new replacement units have been previously allocated to DHA by HUD,[11] although only 75 of these units are currently under construction or completed.[12]

The Homeowners filed this suit against DHA and HUD to enjoin the construction of two new 40-unit public housing projects on sites adjacent to their neighborhoods.[13] The Homeowners allege that the remedy of new construction is not narrowly tailored because it requires that the new units be constructed in predominantly white areas. The Homeowners do not contest either the remedial order's poverty site-selection criterion or HUD's site-selection standards set forth in 24 C.F.R. § 941.202.

In response to the Homeowners' action, the Walker plaintiffs sought declaratory relief that the remedial order

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[10] To date, no plan for the use of Section 8 certificates or vouchers has been submitted to the district court. However, HUD states in its brief to this court that it "expects to meet this obligation by providing funding for Section 8 certificates and vouchers for *all* of the 3,205 units, at a rate of 320 units per year for 10 years. Thus, it is likely that the only public housing units developed under the Remedial Orders will be the 774 units already allocated by HUD and designated as replacement units under paragraph A.1 of the HUD Remedial Order and paragraph A.2 of the DHA Remedial Order."

[11] The district court authorized that 200 of the replacement units may be used in the reconfiguration and revitalization of the West Dallas project.

[12] The 75 units either under construction or completed are at DHA's Frankford & Marsh site.

[13] One site is at the intersection of McCallum and Meandering Way, and the other site is at the intersection of Hillcrest and Highway 190.

was constitutional. The Homeowners' request for an injunction and the Walker plaintiffs' declaratory judgment action were tried together in October 1996. The district court denied the Homeowners' injunctive relief and granted the Walker plaintiffs declaratory relief. The district court gave an oral opinion on August 25, 1997, entered final judgment on September 18, 1997, and issued its written opinion on October 6, 1997.[14]

II. STANDING

As an initial matter, DHA and HUD challenge the Homeowners' standing to bring their suit. The burden of establishing standing rests with the party seeking to invoke federal jurisdiction (*i.e.*, the Homeowners). *See United States v. Hays*, 115 S.Ct. 2431, 2435 (1995); *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). In a case that has proceeded to final judgment, the factual allegations supporting standing (if controverted) must be supported adequately by the evidence adduced at trial. *See Hays*, 115 S.Ct. at 2435; *Lujan*, 112 S.Ct. at 2137; *Gladstone, Realtors v. Village of Bellwood*, 99 S.Ct. 1601, 1616 n.31 (1979); *see also* CHARLES ALAN WRIGHT ET AL., 13A FEDERAL PRACTICE & PROCEDURE § 3531.15, at 105 (2d ed. 1984).[15]

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[14] These opinions will hereinafter be cited respectively as: 8/25/97 Oral Opinion, 9/18/97 Final Judgment, and 10/6/97 Written Opinion.

[15] "If this were an appeal from a judgment granting the defendants' motion to dismiss for lack of standing, we would be required to accept as true all of the material allegations of the complaint. However, because we are reviewing a final judgment based upon a fully developed record, we must evaluate standing from all materials of record." *Pollard v. Cockrell*, 578

The irreducible constitutional minimum of standing is composed of three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hays, 115 S.Ct. at 2435 (quoting *Lujan*, 112 S.Ct. at 2136) (internal citation and quotations omitted). In applying these constitutional standing requirements, the Court has adopted a prudential principle that bars the adjudication of "generalized grievances" against allegedly illegal government conduct.[16] *See id.* In the equal protection context, this prudential principle means that standing exists only for those persons who are personally denied equal treatment by the challenged discriminatory conduct. *See id.* (citing *Allen v. Wright*, 104 S.Ct. 3315, 3326 (1984)); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752, 768 n.26

F.2d 1002, 1006 (5th Cir.1978) (internal citations and quotations omitted).

[16] A "generalized grievance" is a harm "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 95 S.Ct. 2197, 2205 (1975). "The prudential principle barring adjudication of 'generalized grievances' is closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1176 (5th Cir.1993) (en banc).

(1982) (rejecting the proposition that every citizen has "standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws").

DHA and HUD principally contend that the Homeowners lack standing because they allege an injury that is conjectural and a generalized grievance. The essence of the Homeowners' complaint is twofold: (1) they have been purposefully discriminated against because of their race (*i.e.*, they were intentionally singled out because of their race to accommodate two new public housing projects adjacent to their neighborhoods), and (2) this decision has inflicted or threatens to inflict specific injury including decreased property values, increased crime and population density, environmental problems, and diminished aesthetic values of the neighborhood because DHA will fail to operate and maintain the two projects properly. The remedial order's explicit racial classification alone is sufficient to confer standing on these particular homeowners. In *Allen v. Wright*, 104 S.Ct. 3315 (1984), the Supreme Court wrote regarding the "stigmatizing injury" caused by racial discrimination that "[t]here can be no doubt that this sort of non-economic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Id.* at 3326. The Court continued, "Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.*; *see also City of Richmond v. J.A. Croson*, 109 S.Ct. 706, 721 (1989) ("To whatever racial group these citizens belong, their 'personal rights' to be treated with

equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.").

Under the remedial order, DHA selected the homeowners' neighborhood because they are white and they live in an area of Dallas that is at least 63% white. The remedial order also requires that new units not be located in areas where the poverty rate exceeds 13%. Thus, these homeowners' "whiteness" is one of two controlling elements which identified the specific sites adjacent to their neighborhoods for new public housing construction. When a homeowner's neighborhood adjoins a proposed public housing project whose site was determined by a race-conscious standard, he has standing to sue because of the explicit racial classification. *Cf. Hays*, 115 S.Ct. at 2436 ("Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.").

DHA and HUD cite three cases to support their contention that the Homeowners' injury is a generalized grievance lacking the specificity and particularity necessary to confer standing. Each case is easily distinguishable from the case at hand. In *Warth v. Seldin*, 95 S.Ct. 2197, 2208-09 (1975), the plaintiffs alleged that an adjacent town's zoning ordinances effectively excluded low and moderate income persons from living in the town, but they could not demonstrate that the ordinances specifically precluded them from living in the adjacent town. In *Apache Bend Apartments v. United States*, 515 F.2d 1174,

1177 (5th Cir. 1993), the plaintiff-taxpayers were not seeking to litigate their own tax liability, but the tax liability of taxpayers who were not before the court. And in *United States v. Hays*, 115 S.Ct. 2431, 2436 (1995), the plaintiffs were denied standing to challenge a reapportionment plan because they did not live in the district that was the focus of their claim. In contrast to these three cases, the Homeowners live in neighborhoods next door to the proposed new 40-unit housing projects, and the location of these projects was selected specifically because of the homeowners' race.

In general, the racial classification of the homeowners is an injury in and of itself. *See Shaw v. Reno*, 113 S.Ct. 2816, 2824 (1993) ("Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." (internal citations omitted)). But the Homeowners also allege that constructing two new 40-unit public housing projects adjacent to their neighborhoods will cause a decline in their property values and other problems involving crime, traffic and diminished aesthetic values. Relying on the district court's fact finding that the Homeowners have not suffered such an economic injury caused by the new public housing projects, HUD and DHA challenge whether the Homeowners have in fact suffered a decrease in property values. Despite this finding, we cannot conclude, having reviewed the record, that the Homeowners did not put forth adequate evidence at trial to confer standing upon

them. The district court did not hold that the Homeowners lack standing, as he was well aware of the potential for neighborhood disruption traceable to improperly managed public housing projects. HUD and DHA cite no cases in which standing has been denied to homeowners who asserted their quality of life and property values would be diminished by a next-door public housing or other HUD project. The caselaw is to the contrary.[17]

In sum, the Homeowners alleged and sufficiently proved facts that were adequate to support standing to sue.[18]

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[17] *See Alschuler v. HUD*, 686 F.2d 472, 476-77 (7th Cir.1982); *South East Lake View Neighbors v. HUD*, 685 F.2d 1027, 1034-35 (7th Cir.1982); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1054 (3d Cir.1980).

[18] As a subsidiary matter, DHA contends that the Homeowners lack standing because their alleged injury would not be redressed by the invalidation of the remedial order's requirement that public housing be built only in "predominantly white areas." In other words, DHA argues that it could have selected the two sites in question even without the race-conscious site selection criterion.

DHA applies the wrong legal standard. The test is whether DHA *would* have selected these two sites absent the race-conscious criterion, not whether it *could* have selected the sites. *See Warth*, 95 S.Ct. at 2208 (framing the standing question as whether, absent the challenged zoning ordinances that allegedly excluded low-income persons from living in the town of Penfield, there was a substantial probability that the plaintiff would have been able to obtain such housing). There is no evidence in the record that DHA would have chosen the two sites in question absent the race-conscious criterion, and the Walker plaintiffs admit in their brief to this court that "[t]he record is clear that DHA would not have chosen the sites absent the court order."

Additionally, HUD argues that the Homeowners are challenging the wrong part of the remedial order by contesting

The injury they assert is not too abstract or conjectural. The line of causation between the alleged unconstitutional conduct and the injury is not attenuated. And the prospect of obtaining relief from the injury as a result of a favorable ruling is not speculative.

III. HOMEOWNERS' EQUAL PROTECTION CLAIM

The district court held that the Homeowners failed to allege an equal protection violation. The Homeowners challenge this conclusion.

A. Lack of a Similarly Situated Group

The district court, citing *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), found that the Homeowners failed to show an equal protection violation because they did not identify a similarly situated set of black persons who have been treated better. *See id.* at 941 n. 31 This requirement, however, applies only to equal protection claims involving facially neutral government actions, where it is necessary to establish that the government is distinguishing or classifying persons on the basis of race. *See id.* at 941. Explicit racial classifications, in contrast, establish unequal treatment by their very nature. *See Shaw v. Reno*, 113 S.Ct. 2816, 2824 (1993) ("Laws that

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the 3,205 additional units of public housing that must be built in predominantly white areas. It is quite clear from the record, however, that the Homeowners have properly challenged the two 40-unit projects, which were selected on a race-conscious basis to be built next to their neighborhoods. Obviously, these two projects are part of a larger remedial scheme that is affected by this court's opinion herein.

explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition."). Because the Homeowners challenge an explicit racial classification within the district court's remedial order, they have properly alleged an equal protection violation.

The district court also suggested that the Homeowners failed to demonstrate an equal protection violation because "[t]he impact [of the new construction], if any, on the Homeowners will be considerably less than [the] impact of the existing DHA public housing projects on the property owners in the black neighborhoods with existing projects." The district court's reasoning is incorrect: racial classifications are not acceptable simply because they are perceived to have little impact. Any explicit racial classification, regardless of the burdens or benefits it imposes, is suspect and subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2113 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."); *Powers v. Ohio*, 111 S.Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

B. Intent to Discriminate

The district court held that the Homeowners failed to prove an equal protection violation because there is no intent to treat whites worse than similarly situated blacks. Once again, the district court is incorrect. An

explicit racial classification does not require any inquiry into "intent" in order to allege an equal protection violation. *See Shaw*, 113 S.Ct. at 2824 ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."). "Express racial classifications are immediately suspect because, '[a]bsent searching judicial inquiry . . . , there is simply no way of determining whether classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " *Id.* (quoting *Richmond v. J.A. Croson*, 109 S.Ct. 706, 721 (1989)).

The district court's skepticism of the Homeowners' right to pursue an equal protection claim was unfounded, so we proceed to address the merits of their claim.

IV. NARROW TAILORING

The primary issue on appeal is whether the remedial order's requirement that new public housing units be built or acquired in "predominantly white areas" is narrowly tailored to remedy the vestiges of past discrimination and segregation within Dallas's public housing programs. No party suggests on appeal that the racial steering, which for so many years was a part of Dallas's public housing programs, has not been effectively eradicated.[19] Rather, the parties' dispute centers on the district

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[19] *See* 8/25/97 Oral Opinion, at p. 5 ("From the very beginning the primary purpose that DHA had was to prevent blacks from moving into white areas of the city and the suburbs. That is not true of DHA today. . . . ").

court's efforts to rectify the effects of the now-past discriminatory practices of DHA, HUD, and the City of Dallas. In short, is it constitutional in this case to implement a race-conscious site selection criterion for newly built or acquired public housing?

Any race-conscious remedial measure receives strict scrutiny under the Equal Protection Clause. *See Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2113 (1995); *Black Fire Fighters Ass'n v. Dallas*, 19 F.3d 992, 995 (5th Cir. 1994) [hereinafter *BFFA*]. This is true no matter which race is burdened or benefitted by the racial classification in question. *See Adarand*, 115 S.Ct. at 2110-11 (citing *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 722 (1989)). Strict scrutiny requires that a racial classification be (1) justified by a compelling government interest and (2) narrowly tailored to further that interest. *See Adarand*, 115 S.Ct. at 2113. The Homeowners do not contest that there exists a compelling government interest in this case. Therefore, our inquiry focuses on whether the remedial order is narrowly tailored.

In assessing whether a remedy is narrowly tailored, courts are to assess five factors: (1) the necessity for relief, (2) the efficacy of alternative remedies, (3) the flexibility and duration of relief, (4) the relationship of the numerical goals to the relevant market, and (5) the impact of the relief on the rights of third parties. *See United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987); *BFFA*, 19 F.3d at 995. Before examining these factors, however, we must address the standard of review.

When a district court's race-conscious remedial measure is challenged as not being narrowly tailored, the party defending the remedial measure bears the burden

of producing evidence that the remedial measure is constitutional. *See Wygant*, 106 S.Ct. at 1848-49; *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994); *see also Raso v. Lago*, 135 F.3d 11, 20 (1st Cir. 1998) (Stahl, J., dissenting). The party challenging the remedial measure, of course, bears the ultimate burden of demonstrating that the racial classification is unconstitutional. *See id.*

In general, we review a district court's legal conclusions de novo and its findings of fact for clear error. However, "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 102 S.Ct. 2182, 2189 n.15 (1982); *see also United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993).

In the case at hand, the district court placed the burden of production, as well as the ultimate burden of proof, on the Homeowners. Because he improperly placed the burden of production, we are not bound by the clearly erroneous standard in reviewing his findings of fact. Nonetheless, although more rigorous review may be in order, we will deferentially examine the district court's findings because this is a complicated case in which the district court has a decade's worth of experience with Dallas's public housing programs.

Race-conscious remedies must be narrowly tailored to eliminate the effects of past discrimination as well as bar like discrimination in the future. *See Paradise*, 107 S.Ct. at 1067-68; *id.* at 1073 (citing *Louisiana v. United States*, 85 S.Ct. 817, 822 (1965)). "Racial classifications are simply too pernicious to permit any but the most exact

connection between justification and classification." *Adarand*, 115 S.Ct. at 2113 (quoting *Fullilove v. Klutznick*, 100 S.Ct. 2758, 2805 (1980) (Stevens, J., dissenting)). This means that a race-conscious remedy must be framed to address the exact effects and harms of the discrimination at issue. *See Wygant*, 106 S.Ct. at 1850.

In application, arriving at an exact fit between harm and remedy requires consideration of whether a race-neutral or less restrictive remedy could be used. *See Adarand*, 115 S.Ct. at 2118; *Wygant*, 106 S.Ct. at 1850 n.6. This is because a race-conscious remedy should be the remedy of last resort. *See Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir. 1996) ("[E]xplicit racial preferences, if available at all, must be only a 'last resort' option."). A "race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives – particularly race neutral ones – have been considered and tried." *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997).[20]

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[20] It is true that in *Hills v. Gautreaux*, the Supreme Court did not disapprove a remedial order which, to end discrimination in public housing, required housing to be built in nonblack neighborhoods of Chicago. *Hills*, 425 U.S. 284, 296, 96 S.Ct. 1538, 1546 (1976). But the Court did not consider the propriety of that remedy as opposed to a non-race conscious remedy like a vigorous Section 8 program. The only disputed issue in that case was whether the remedy could extend beyond the city limits of Chicago. Further, *Hills* predates significant changes that have occurred both in HUD's approach to public housing and in the scrutiny afforded race-conscious remedies. *Hills* does not mandate either the construction of new public housing or race-conscious site selection. We must review the application of the *Paradise* factors, which the district court correctly understood to frame the issues here.

The first two *Paradise* factors are the necessity for relief and efficacy of alternative remedies. These weigh against race-conscious site selection for two reasons. First, Section 8 housing vouchers have not been given a fair try to prove their potential to desegregate. Second, other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing. *See infra*, text at n. 31.

The Homeowners argue that section 8 alone is capable of remedying the effects of past discrimination in Dallas's public housing programs, and they contend that section 8 has not been given a fair try. They also point out, and the district court agrees, that Section 8 is more cost-efficient than new construction and is preferred by the majority of public housing program participants. Section 8 is more flexible than fixed public housing because the participants may decide where and in what type facility to reside. As a result, virtually all available Section 8 vouchers have been snapped up in Dallas.

Unfortunately, however, numerous programs that would encourage and assist black families to use section 8 in predominantly white areas had been in effect or fully operational for only a short time before trial on the Homeowners' case. For instance, the record indicates that DHA's mobility program had been operating as originally proposed by the Walker plaintiffs and the district court since only approximately 1994.[21] In addition, exceptions

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[21] *See* 10/30/96 Testimony of Ann Lott, Director of DHA's Section 8 Mobility Program (agreeing that most of the efforts to improve DHA's mobility program have been within the preceding two years); 8/7/96 Deposition of Lott (explaining

to the "fair market rent" caps on section 8 vouchers and certificates have been slow in coming.[22] It also appears that potential Section 8 landlords may now be paid "signing bonuses" for accepting section 8 tenants. These are but three examples of numerous "helping-hands" that may be employed to promote the success of Section 8 as a desegregation tool.[23] While the history and timing of their implementation by DHA and HUD in this case are not perfectly clear, it is evident from the record that they were not programs of long-standing before trial. If section 8, combined with such assistance programs, is an effective desegregation tool, then section 8 is superior to

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new procedures within DHA's mobility program that were implemented in the prior year, including a marketing campaign for prospective landlords, a landlord newsletter, and private briefings for landlords on the Section 8 program). *But see* 10/30/96 Testimony of Lori Moon, President & CEO of DHA (stating that DHA's mobility efforts have been in effect since 1989).

[22] It is unclear from the record whether HUD has granted DHA a 120% fair market exception rent across-the-board for all Section 8 housing in predominantly white areas. It is also unclear whether DHA could be granted fair market rent exceptions higher than 120%. Evidence in the record shows that a 160% fair market exception rent would significantly increase the availability of Section 8 housing in predominantly white areas. Prior to implementing a race-conscious remedy, it would seem advisable to ensure (1) that rent exceptions above 120% are foreclosed, as they offer the potential to break-down a significant barrier to an even more effective Section 8 program, or (2) that 120% fair market exception rents have been fully implemented and tried, if that is the statutory maximum.

[23] Another example would be the vigorous enforcement of state and federal laws prohibiting racial discrimination by private Section 8 landlords.

a race-conscious remedy in that it allows market forces and personal preferences rather than racial criteria to guide the homemaking decision.

The district court found, agreeing with the Walker plaintiffs, DHA, and HUD, that section 8 needed to be combined with new construction or acquisition in predominantly white areas in order to remedy the effects of past discrimination. Adopting the Walker plaintiffs' proposed findings of fact and conclusions of law *in toto*, the court concluded that Section 8 alone was an inadequate remedy for several reasons: there are not enough Section 8 units in predominantly white areas; among the available units there is a lack of three and four bedroom units; rents in predominantly white areas are too high to be covered even by Section 8's fair market exception rents; landlords do not want to participate in the Section 8 program; and Section 8 participants become frustrated in looking for housing in predominantly white areas and settle for housing in minority areas. The court also found that rental contract requirements in predominantly white areas contain provisions that are difficult for Section 8 families to meet (*e.g.*, high security deposits, requirement of having held a job for the past year, *etc.*). We neither accept nor attempt to reject these factual findings. Rather, there is one overarching factual finding by the district court – which is uncontested by all parties – that transcends the parties' objections to Section 8 as a remedial measure.

In 1987, when the district court first found DHA in violation of its original consent decree, a negligible number of black families in DHA's Section 8 programs

lived in predominantly white areas.[24] In contrast, in September 1994, approximately 1,050 Section 8 black families lived in predominantly white areas.[25] And in the fall of 1996, there were approximately 1,335 Section 8 black families in predominantly white areas.[26] These numbers show that in the two year period between 1994 and 1996, the number of Section 8 black families living in predominantly white areas increased by 285, or 27%. And it was during this same time period that DHA's Section 8 mobility program was getting fully underway. The program currently in place, which the district court has not criticized, essentially became fully operational around 1994. Based on the relative success of DHA in moving blacks into predominantly white areas via its Section 8 program between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination. *Cf. In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1545-47 (11th Cir. 1994);[27]

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[24] The Walker plaintiffs state that in 1987 there were 66 Section 8 black families living in predominantly white areas, which amounted to approximately 2.4% of all black families in DHA's Section 8 program.

[25] According to testimony in the record, this amounted to approximately 21% of all black families in DHA's Section 8 program.

[26] According to testimony in the record, this amounted to approximately 24-25% of all black families in DHA's Section 8 program.

[27] In *In re Birmingham Reverse Discrimination Employment Litigation*, nonblack employees of the Birmingham Fire Rescue Service (BFRS) challenged a 1981 consent decree entered into by

see also BFFA, 19 F.3d at 995 ("The broad skip promotion remedy in the decree is difficult to justify when the knowledge to narrow it seems readily available."). Section 8, a race-neutral remedial measure, is increasingly successful at moving black families into white areas, and the record indicates that it could be even more successful with, for example, increased funding for both more vouchers and the mobility program,[28] more mobility

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the City of Birmingham that required, *inter alia*, that 50% of all promotions to the rank of BFRS lieutenant would be filled by qualified blacks (*i.e.*, for every two promotions to lieutenant, one must be filled by a black candidate). *See id.*

The 11th Circuit noted that between 1978 and 1981, BFRS significantly increased its total number of black employees from 8 to 42, which represented a shift in the black percentage of BFRS's workforce from 1.89% to 9.3%. *See id.* This was achieved without the use of a race-conscious remedy. *See id.* The court stated that "there is strong evidence in the record of this case that the City had implemented effective alternatives to race-based quotas to remedy its prior discriminatory behavior." *Id.* "While the district court correctly concluded that, when the decree was entered, no black had as yet become a fire lieutenant, we believe that, given the City's progress at the entry-level, alternative measures designed to increase black representation in the fire lieutenant ranks were feasible." *Id.* The court proceeded to list the non-race-based remedies that the plaintiffs proposed regarding promotion to BFRS lieutenant. *See id.* at 1546-47. It then concluded, "Considering the efficacy of the alternative remedies, the relief provided in the decree cannot be reconciled with the requirement that a government's use of race must be narrowly tailored." *Id.* at 1547.

[28] *See* 10/30/96 Testimony of Ann Lott, Director of DHA's Section 8 Mobility Program, at III-43 (stating that DHA is able to use virtually every Section 8 voucher or certificate funded by HUD); *see id.* at III-65 (stating that DHA could put to use an additional 1,500 Section 8 vouchers).

counselors,[29] and higher fair market exception rents.[30] When Section 8 has evidenced such promising results, options such as these should be explored and tested before adopting a race-conscious remedy as a last resort.

Additionally, it is unnecessary to employ the race-conscious site selection criterion ordered by the court even if new construction or acquisition of public housing occurs. The district court may proceed with new construction as part of his remedial plan, but he may not do so using a race-conscious site selection criterion. Of course, other criteria may be employed to guide site selection for new construction. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236-37 (2d Cir. 1987) (using a geographical site selection criterion for public housing). The district court has already mandated that all new sites be in areas where the poverty rate does not exceed 13%.[31] The district court's concern that if it does not attach a race-conscious site selection criterion to new construction, then the new units will end up in minority areas and, as a consequence, Dallas's public housing projects will almost all remain in minority areas, is unfounded.[32]

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[29] *See id.* at III-67 (stating that the mobility program could use more counselors).

[30] *See id.* at III-57 (stating that higher fair market exception rents would assist in obtaining more Section 8 housing in predominantly white areas).

[31] It is suggested in brief that this criterion essentially restricts the areas available for new construction to predominantly white areas.

[32] Moreover, the district court referred throughout his 8/25/97 Oral Opinion and 10/6/97 Written Opinion to the

In deciding that Section 8 and nonracial site selection criteria should be implemented before a racial standard, we are mindful of the "respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." *Paradise*, 107 S.Ct. at 1073. Nonetheless, a district court's broad equitable powers remain constrained by the boundaries of narrow tailoring.[33] The recent success of Section 8 and the availability of viable nonracial, non-discriminatory site selection criteria, combined with the factors discussed in the following paragraphs, demonstrate that the remedial order's race-conscious site selection criterion is not narrowly tailored.

First, DHA, HUD, and the City of Dallas are all cooperating defendants. That is to say, DHA, HUD, and the City of Dallas no longer discriminate against black families in DHA's public housing programs, and – by all accounts in the record – all three defendants are active participants in crafting and implementing remedial measures to eliminate the vestiges of past discrimination. In contrast, the Supreme Court approved a race-conscious

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danger of losing the funds already allocated to new construction because they could not be transferred to the Section 8 program. This may be true. Nonetheless, it does not justify the use of a race-conscious site selection criterion.

[33] *See Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (*en banc*); *Wessmann v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) ("*Croson*, in particular, leaves no doubt that only solid evidence will justify allowing race-conscious action . . . "); *id.* ("Our dissenting brother's valiant effort to read into *Croson* a broad discretion for government entities purporting to ameliorate past discrimination strikes us as wishful thinking.").

remedy in *United States v. Paradise* in large part because earlier, less restrictive remedies had proven ineffective since the defendant continually resisted their implementation and stonewalled in developing acceptable procedures for the advancement of black troopers within the Alabama Department of Public Safety. *See Paradise*, 107 S.Ct. at 1062-63 (describing the Department's continuing failure to comply with the parties' consent decrees); *id.* at 1066, 1069; *see also BFFA*, 19 F.3d at 996 (finding a race-conscious remedial measure unnecessary, in part, because the defendant was a willing party to the settlement of the lawsuit). Where, as here, the defendants have begun making race-neutral, good faith, and effective efforts to remedy the wrongs of the past, a race-conscious remedy should only be a last resort.

Second, the district court, in his 8/25/97 Oral Opinion, made references to the necessity of a race-conscious site selection criterion because some participants in DHA's public housing programs do not want and should not be forced to use Section 8.[34] While some may find it

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[34] *See, e.g.*, 8/25/97 Oral Opinion, at p. 28 ("Even if this money [for new public housing construction] could be reprogrammed for Section 8, there would still be a need for the use of public housing in the desegregation plan. Section 8, although the preferred method, is not the only method. Indeed, there are members of this class who made it evident, abundantly clear to this Court, that they did not trust Section 8, they would not use Section 9 [sic], and they should not be forced to use Section 8."); *id.* at p. 33 ("I recognized then, as I do now, that although Section 8 certificates and vouchers may be the preferred method for most people, for many people there are risks in Section 8 that not all class members would want to take. I declined to force those risks upon unwilling class members.").

difficult to use Section 8, a race-conscious remedial measure is not justified by certain class members' objections to looking for housing on their own versus their being offered a unit owned and operated by DHA. A race-conscious remedy is justified, after race-neutral remedies have been considered and found wanting, if it is the only effective means by which to remedy the effects of past discrimination. It is by this standard alone that the district court must assess his remedial orders. As applied to the facts of this case, the district court's concern seems particularly irrelevant as only 474 new units in predominantly white areas are currently funded, and those units must be filled by Section 8 families who participate in DHA's Family Self-Sufficiency Program.[35] That is, they will be filled by the "cream-of-the-crop" from DHA's waiting lists. Thus, those who in all probability need public housing units the least (because they would be successful Section 8 participants) will be directed to the new units, while those for whom the district court expresses concern will be left with Section 8. DHA's rationale for filling the new units with participants in its self-sufficiency program is commendable, but it throws askew part of the district court's reasoning regarding the

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[35] DHA's Family Self-Sufficiency Program is a voluntary program that requires participants to, for instance, be employed or attend school. The participants sign a five-year contract with DHA in which they agree to abide by the program's regulations. In essence, the program is designed to make its participants self-sufficient by providing them with "upward mobility type assistance." 8/7/96 Deposition of Lori Moon, President & CEO of DHA, at p. 110.

remedial need for new construction in addition to Section 8.

Third, it remains unclear why there is an absolute remedial necessity to build 474 new units of public housing using a racial classification when (1) 2,033 (or 72%) of the remedial order's 2,807 replacement units will be Section 8 and (2) DHA and HUD may submit a plan to use Section 8 for all of the 3,205 additional units of public housing to be built in predominantly white areas.[36] In sum, out of a total of 6,012 units within the remedial order, only 474 (or 8%) must – *assuming* an acceptable Section 8 plan is submitted for the 3,205 additional units – be new construction in predominantly white areas. If Section 8 can effectively satisfy the district court's remedial goal regarding 5,628 units, it is baffling to assume that it cannot do so for an additional 474 units.

DHA, HUD, and the City of Dallas offer two responses to this criticism. First, they argue that 474 units is a tiny proportion of the overall number of units contemplated by the remedial order; the deference due a district court in fashioning a remedial order should protect such a small element of the overall remedial plan. This would be correct if the 474 units were not attached to a racial classification which requires that they be built in predominantly white areas. Racial classifications, even small ones, receive strict scrutiny. Second, they contend that if the 474 units already funded by HUD are not built in white areas, they will either not be built at all or will

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[36] As noted previously, HUD states in its brief to this court that it intends to fulfill its entire obligation regarding the 3,205 additional units with Section 8 vouchers or certificates.

be built in minority areas which will only further the racial segregation of DHA's public housing projects. As discussed previously, the district court may entertain any number of site selection criteria regarding new public housing units, except for race. No one suggests that the 474 units should not be built, only that requiring that they be built using a race-conscious site selection criterion is not narrowly tailored.

The fourth *Paradise* factor, the relationship of numerical goals to the relevant markets, also cuts against the race-conscious site-selection criterion in the remedial order.[37] The district court's remedial goal is to have half of the families in DHA's public housing programs (either public housing units or Section 8) in predominantly white areas of Dallas and half in "minority areas". The justification for this goal is that Dallas's population is approximately half white and half "minority" and, therefore, public housing should be divided accordingly. This goal is overly broad. This suit was brought by black plaintiffs on behalf of a class of black plaintiffs. There is no suggestion that the suit ever expanded to include all minorities or that any liability of the public agencies to other minorities could be found. The court's definition of a "predominantly white" neighborhood, with 63% white population, is also based on the idea that public housing may not be placed in neighborhoods with higher concentrations of Hispanics. There is no evidence in the record to support the court's arbitrary definition of a predominantly white neighborhood. The emphasis should instead be directed

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[37] The third *Paradise* factor considers the flexibility and duration of relief. On balance, that factor is neutral in this case.

toward placing public housing participants in neighborhoods of their choice through a vigorous Section 8 program, non-black neighborhoods, census tracts in which no public housing currently exists, or non-poor neighborhoods.[38]

The fifth *Paradise* factor is the impact of a racially-conscious site selection criterion on the rights of third parties. Among all the groups affected by Dallas public housing, only these Homeowners have maintained that they would be injured by the racially-based site selection process that occurred here. Despite the court's having purportedly found against them on this issue, the totality of the remedial order is far more ambivalent. The district court ordered stringent criteria for the design and upkeep of the projects and for tenant selection here and in another "predominantly white" neighborhood (the Frankford & Marsh site, fn.12 *supra*), and he called for the participation of neighboring community members, like these Homeowners, in planning the projects. The court showed considerable sensitivity to the fact that public housing has in the past been disgracefully neglected in Dallas. The resulting remedial order thus cuts both ways with respect to the Homeowners' rights. On one hand, it

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[38] According to the Walker plaintiffs' brief, at 11: "There are 113 county census tracts with 63% or greater non-Hispanic white population, 95 of which have a poverty population less than the county average. There are an additional 20 tracts with a non-Hispanic white population between 50% and 63%. Only seven of these tracts have a poverty rate less than the county's. There are an additional 16 tracts with a poverty population below the county average but the non-Hispanic white population is less than 50%."

attempts to placate their fears of deterioration in their neighborhoods. On the other hand, it lends credibility to those fears.

Because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, the provision of the court's remedial order calling for the construction or acquisition of units of public housing in "predominantly white" areas is unconstitutional. Under the balance of the *Paradise* factors, the criterion is not narrowly tailored, and it is premature to utilize such a last-resort measure. We must vacate and remand this portion of the remedial order for further consideration.

In so doing, we emphasize several points. First, increased reliance on Section 8 demands that the public agencies implement a vigorous mobility plan that serves the relocation needs and concerns of black families, reaches out to white landlords, affords adequate fair market rent exceptions, and combats illegal private discrimination. Second, this opinion does not deal with the remedial order's nondiscriminatory tenant selection and assignment provisions, which are not challenged by the Homeowners. Third, this opinion does not preclude the construction or acquisition of additional public housing if sites are selected by means of nonracial criteria. But we also recognize that Section 8 is overwhelmingly preferred by public housing families, that it allows market forces and personal preferences to control the homemaking decision, and that it has not proven ineffective at desegregating Dallas's public housing programs when combined with a vigorous mobility program. As applied to the facts of this case, the district court erred in employing

a race-conscious remedy before utilizing race-neutral alternatives.

V. CONCLUSION

For the foregoing reasons, the district court's remedial order is **VACATED** to the extent indicated and the case is **REMANDED** for further proceedings; the declaratory judgment awarded to the Walker plaintiffs is **REVERSED**; and this court's stay of construction at the sites adjacent to the Homeowners' subdivisions shall be **ENFORCED** until the district court holds additional hearings and enters a remedial order revised in accordance with the foregoing opinion.

Remedial order **VACATED** and **REMANDED**; declaratory judgment for Walker plaintiffs **REVERSED**; stay **ENFORCED** pending entry of revised remedial order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL	)	NO. 3:85-CV-1210-R
VS.	)	Dallas, Texas
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL	)	August 25, 1997

TRANSCRIPT OF COURT'S RULING

(Filed Sept. 8, 1997)

BEFORE THE HONORABLE JERRY BUCHMEYER
CHIEF UNITED STATES DISTRICT JUDGE

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[p. 3] PROCEEDINGS

THE COURT: This is Civil Action 85-1210, Walker versus HUD and others.

Appearances of counsel. Mr. Daniel.

MR. DANIEL: Your Honor, Michael Daniel for plaintiffs.

MS. BERSHARA [sic]: Laura Beshara for plaintiffs.

THE COURT: Homeowners?

MR. LYNN: Mike Lynn and Tom Melsheimer, Your Honor.

MR. GREINER: Your Honor, Jim Greiner for HUD.

MR. DALEY: Bill Daley, HUD.

MR. CERBONE: Bill Cerbone for HUD.

MR. WERNER: Joe Werner for Dallas Housing Authority.

THE COURT: You're not going to appear?

MS. JONES: Mattye Jones, Housing Authority.

THE COURT: The remarks which I'm going to make are a summary of an opinion which hopefully will be entered either later this week in full or certainly by the end of next week. That's subject to one of development which I think is a minor development which may affect the number of units on one of the pieces of property which the lawyers discussed with me, and if additional information is needed, that will not delay the issuance of the opinion or the appeal [p. 4] by the homeowners.

This Court's opinion in the third Walker case began with this language "This is a class action that involves racial discrimination in low income public housing in the City of Dallas and its suburbs." The Walker plaintiffs first

named a number of suburbs. That was when the lawsuit was originally filed. As a matter of fact, the case was for many years known in the clerk's office as Walker versus The City of Mesquite. Subsequently the plaintiffs, although they joined the suburbs as defendants, because they were alleging a long, unbroken history of deliberate segregation and discrimination in public housing, not only in the Dallas Housing Authority but also the City, HUD, and also white nonminority areas and associations in Dallas and in the suburbs, the Walker plaintiffs dismissed the suburbs voluntarily early on in the case, which left the defendants DHA and HUD, until in conjunction with the three Walker opinions, the City of Dallas was entered as a party defendant.

Indeed, this Court has one other pending lawsuit which alleges housing discrimination. It involves a suburb and it is set for trial this fall and it will be tried this fall. It also is one of the older cases on my docket. I say that to emphasize at the beginning of these remarks that this case has always involved something more than just Dallas.

The first consent decree that was approved by this [p. 5] Court on January 20, 1987, was followed, it seems like almost immediately, by a motion to modify the consent decree filed by the plaintiff class. The plaintiffs sought injunctive relief that would require the City to provide the counseling and transportation services necessary to help black families move into nonminority areas in Dallas and in its suburbs under the DHA Section 8 assisted public housing program. Those are the certificates and vouchers which are directly involved in this dispute.

The Walker III opinion describes in substantial detail the tragic history of racial discrimination and segregation in low income public housing in Dallas and necessarily, even though to a lesser extent, it describes that discrimination in the suburbs.

I'm going to summarize just a few of the points from that history to put things in context. From the very beginning the primary purpose that DHA had was to prevent blacks from moving into the white areas of the city and the suburbs. That is not true of DHA today, and in more recent years, the efforts of the suburbs or the efforts of neighborhood associations, or groups in the nonminority areas in Dallas, have been engaged in one battle after another that would prevent blacks from moving into their areas, whether in the city or in the suburbs.

The Walker III history traces some of that [p. 6] unfortunate history in Dallas. There are a number of incidents. Again, to put this one in context, the first incident, number one, was in 1950. It involved DHA considering property at Haskell and Dolphin for a Negro project. That's in quotes, it was a Negro project. At the DHA board meeting considering this Negro project, there was a committee of homeowners there, approximately 100 property owners who opposed the location at Dolphin and Haskell Avenue. It opposed it because the agreed line of demarcation between colored residents and white residents in the City of Dallas was Haskell Avenue.

Someone on the board suggested that, well, they can erect a tall fence and they could put up shrubs which would effectively separate the housing project from the white areas across the street. The opposition was so great

that the DHA felt there was a possibility of racial difficulties, which, indeed, had existed recently at that time in South Dallas. That resulted in DHA abandoning the project and maintaining Haskell as the then dividing line between whites and blacks in their residential areas and in their lives in the City of Dallas.

The second incident was the West Dallas housing project, 1950 to 1955. There was a critical need for additional low income housing. Unfortunately DHA and the City felt an equally important need to keep blacks from [p. 7] moving into white areas. This became known, and this term was actually used in the Dallas Morning News and papers of that day as the Negro housing problem. Whites in South Dallas were demanding that the City of Dallas take immediate action to stop black families from moving, from buying homes in white districts. There were several bombings of houses that were built by a few blacks in the white neighborhood. There was a 1950 joint report on Negro housing which found that the shortage of housing for blacks was acute and critical and the serious tension would continue until that was relieved and that resulted in the eventual approval and creation of West Dallas. The West Dallas project – it's almost unbelievable looking back, but the West Dallas housing project actually had whites, Hispanics and African-Americans. There were three separate sections and the three races were divided. An African-American resident was not permitted to live in the white project nor in the Hispanic project.

Within a relatively short period of time, the vacancy rates for whites and Hispanic units started going up.

Blacks were moving into those units as the vacancies were not filled with whites or Hispanics.

The evidence introduced earlier in this case concerning those happenings would indicate that there was a stigma attached to life in West Dallas for lack of adequate shopping facilities, there were no churches, there were no [p. 8] cultural facilities. Transportation was nonexistent, public transportation, lack of schools, lack of medical care. There was dust, smoke, obnoxious smells from the lead plants and other industrial plants that neighborhood – that were neighbors of the West Dallas housing project.

The third chapter is 1962. The City of Dallas needed additional housing for low rent public housing. DHA proposed the construction of an additional 3,000 units which were needed. Opposition developed immediately, vigorously to those 3,000 units because they were not going to be placed in West Dallas. And rather than have those new 3,000 units built in other non-West Dallas areas, the Housing Authority decided it would not take any action backed by the City of Dallas and those 3,000 units were lost.

The fourth chapter, 1975 to 1986, this is extremely relevant to the claims before me today because this is the beginning of the Section 8 certificate and voucher programs. It was 1975 that DHA began to operate the Section 8 assistance programs which provided rent subsidies to tenants that were seeking low income housing. That certainly provided DHA with an opportunity to desegregate the public housing by moving blacks and Hispanic families into nonminority areas in Dallas and the suburbs. Indeed, in 1978, the attorney for DHA stated in a letter to

HUD that DHA not only had the authority to honor Section 8 certificates in [p. 9] the suburbs but it also had the Constitutional duty to help correct the effects of past racial discrimination. Despite that, DHA allowed only a handful of tenants to go to the suburbs, and then shortly after that it completely refused to honor any Section 8 certificates for people who wanted to use them in the suburbs.

The fifth chapter involves an incident in 1978 where there were 224 units that were lost. In 1978 DHA had received HUD authorization to construct 224 new units in low rent public housing. If these had been placed in nonimpacted areas, nonminority areas, then black tenants would have had a choice outside of minority areas, but instead, the City of Dallas successfully obstructed the development of these 224 units. Indeed, they objected to those units even being constructed on a scattered-site basis in nonminority areas of Dallas. Again, the suburbs were directly involved. When the suburb cities refused to accept any of those 224 units, the City of Dallas rejected entirely the 224 units that were available.

The sixth chapter is the Washington Place replacement, 1982 to 1986. In 1982 a lawsuit was filed which challenged the sale of Washington Place, one of DHA's properties. The sale was to Baylor University Medical Center. That sale resulted in the demolition of 347 units of HUD housing. The lawsuit was settled. And instead of those [p. 10] 347 units, DHA and HUD agreed to a one-for-one replacement of those 347 units. Some of those replacements were done by rehabilitation of a couple of dilapidated public housing units. Another was a rehabilitation of some additional units in near East Dallas.

The final replacement of those 347 units was construction of 106 units of new low rent public housing with new funding provided by HUD. This was known as Town Park. Substantial opposition immediately grew up to putting the Town Park units in East Dallas first. For example, the Lakewood Homeowners Association made these arguments and they made them vigorously. Town Park was too far from adequate facilities for the poor, such as grocery stores, retail shops, laundromats, hospitals. There wasn't adequate public transportation. It would have an adverse effect on public schools, and a new objection this time I believe for the first time in the records of this case, that it was really a bad deal because DHA was paying way too much for the property at Town Park.

Now, I emphasize these same objections, not because they're being made in this case, which I'll comment on later, but because each time the same objections are made again and again to putting public housing in nonminority areas regardless of what site. Still on the replacement for Washington Place, it wasn't until 1987, and that was three years after the deadline for the site selection by DHA, that [p. 11] DHA finally, finally agreed to purchase five scattered locations for which these 106 replacement units would be constructed. Again there was opposition to those five scattered sites by neighborhood groups, by local politicians, because as this Court repeatedly observed in the Walker opinions, no one wanted public housing in their neighborhood.

Chapter seven is Country Creek, now known as Barbara Jordan Square. The initial consent decree in this case provided for the construction of 100 units of low rent public housing in nonminority areas. These 100 units

were the first new public housing to be constructed in Dallas since the West Dallas housing project in the 1950's. DHA, under the consent decree, sought solicitation for bids, went through a couple of rounds of bid for those 100 units. It found none of those satisfactory. Eventually it turned back to the area known as Country Creek.

Now, DHA had looked at the Country Creek location in connection with the Washington Place destruction, had scheduled a public hearing, and because of the outcry, there were 300 people who strongly opposed the development, as did the DISD chairman of the board and the mayor of Dallas. And so that project was – had been earlier rejected by DHA because of that reason. However, they were under compulsion by the settlement agreement, the initial settlement agreement in this case, to construct those 100 units.

[p. 12] This Court held a hearing to determine why DHA should not be held to contempt for failing to meet every deadline that had been set for construction of those 100 units: the site selection, the beginning of construction, the completion of construction. At that hearing it was obvious that Country Creek was the only available, the only acceptable location for the 100 units. DHA didn't select them, the Court ordered them, and no doubt, DHA didn't select those units because they wanted the Court to order them. Those 100 units were not acceptable for the suburbs either. In fact, the evidence before the Court indicated that the – that the best site, the most acceptable site, the number one choice, was a site in Seagoville, but that was opposed. It was opposed by the neighborhood groups, just like the Country Creek area had been opposed, just like the East Dallas site had been opposed,

just like the scattered-site units for Washington Place had been opposed.

The seventh incident is more directly relevant and this is the first suburb location at Frankford and Marsh. This was the first site selected by DHA under the current settlement agreement. Again homeowners objected. They raised the by now traditional objection, no public transportation, there were no grocery stores, the schools were overcrowded, there were no health facilities. After a hearing at which the Court heard witnesses on both sides, it [p. 13] approved the site. At this time it did so it appointed a group of homeowners which belonged to one or more of the homeowners associations that were opposing the public housing at Frankford and Marsh. That advisory committee has continued to work with Dallas Housing Authority and is still working with Dallas Housing Authority and that committee has had a direct impact on those housing units; had an impact on the location, that is how the units are placed on the property; had an impact on bus service, an impact on public safety.

That committee assisted DHA and indeed perhaps the committee representatives were very effective lobbyists with the City of Dallas expressing concerns about safety that resulted in the City committing to put a storefront police office on the site of the public housing at Frankford and Marsh.

DHA has committed that that project will not be a project for tenants who want to remain in public housing. The selection of tenants will hopefully result in tenants who will be in and out of those units in five years and then move out on their own. The tenants that are selected

will have either a job to help support their families, or they will be engaged in some educational or training program that would lead to such a job. The neighborhood association committee also had a great impact in discussions, not only with the DHA [p. 14] people but also with the City, concerning criminal checks of the people who would be tenants in those units and people, like relatives, who may be regular visitors to those units.

The eighth chapter is this one, that's the Highlands of McKamy Community Involvement Association and Preston Highlands Homeowners Association. Here the DHA, again complying with the current consent decree, selected two additional sites. These had to be nonminority sites, select them in the suburbs. The property is near the two – the two associations, Highlands of McKamy and Preston Highlands. These units are to be even smaller than Frankford and Marsh, 40 units on one, 40 or less on the other piece of property.

Again, the homeowners through these two associations and the two individual plaintiffs have objected strenuously and they seek to enjoin the construction of this public housing. All of the letters which I receive concerning pending litigation are filed in that case. I received a number of letters at various stages concerning this issue from members of the association. Some of those made the same objections that this Court had heard and rejected repeatedly before, including those that had been made in the Frankford and Marsh acquisition: no public transportation, no schools or overloading of schools, no stores, et cetera.

The attorneys have not made those arguments. [p. 15] Instead they present the argument that Section 8 is less intrusive. It's a less intrusive means of remedying the past discrimination found in this case. And the argument is that therefore, it's improper to construct public housing units on those two pieces of property.

Now, in response, the class plaintiffs asked this Court for declaratory relief that the site selection, the race conscious tenant selection and assignment, and the race conscious Section 8 mobility portions of the remedial order affecting DHA are constitutional. DHA opposes the homeowners' request for injunctive relief. HUD has approved these two sites. HUD also supports the use of both public housing and the use of Section 8 certificates and vouchers in the remedy in this case. They do not support either the sole use of Section 8 certificates or the sole use of public housing.

The dispute presents this issue: Are the race conscious site selections, tenant selection assignments and Section 8 mobility portions of the DHA remedial order constitutional? The homeowners' attorneys do not contest the need to remedy the past racial segregation and discrimination in DHA's programs. They do not contest the fact that that is a compelling government purpose which justifies race conscious relief.

However, they argue strenuously one issue, whether [p. 16] the specific race conscious element, here the small – relatively small amount of public housing combined with Section 8 certificates and vouchers, meet the requirements that the remedy fit the violations in a narrowly tailored

manner. Again, the argument is given a compelling government purpose which justifies race conscious relief in the three areas, does the relief meet the requirement that the remedy fit the violation in a narrowly tailored manner.

Now, specifically, the homeowners allege that the choice of these two sites violates their equal protection rights because they were chosen in part based on the race of the people who will occupy those units and the race of the people who live in this area, white. The homeowners claim that the injury will be caused by a diminution damage in the value of their homes and their real property.

At the hearing the issue of whether there had been diminution in value from the announcement of the DHA project alone or from the progress made on these plans had, in fact, damaged the value of the homes, and if it had, how much is the loss in value. Again, that is contested, and I will address that later.

However, there are certain things the homeowner [sic] do not allege. They do not allege that these two new DHA units are unlawful, that they're a nuisance in violation of the law, or that they are a violation of their constitutional [p. 17] rights concerning property, or that they violate deed restrictions of the association, or that they violate any zoning or building codes. Nor do the homeowners claim any type of general right to be free from public housing close to their neighborhoods.

They do claim that the race-based site selection violates their rights not to be discriminated against because

of race and not to suffer a loss in their property values because of that discrimination.

The homeowners more specifically assert that the loss in property value will be caused by two factors: one, that DHA will fail to maintain and manage the property in a proper manner, that they will not manage and maintain the physical condition of the property. The second argument about loss of value is that the residents of these two public housing sites will be shunned by their neighbors. And supposedly the resulting social isolation of those minorities in these two areas will make antisocial conduct by the people who live in those public housing projects more likely.

This case does not involve one other important thing. It does not involve the usual issues of affirmative action in which because of the race, one person is preferred over another person either for a job, for promotion, for a place in school. What this case does involve in contrast to those is an issue of whether or not a facially race neutral [p. 18] programs, public housing, can be used in a race conscious manner to eliminate racially segregated public housing conditions. The homeowners do not allege a loss of a job, a loss of a promotion or dilution of seniority rights or failure to gain admission to a school. Nor do they claim that they're being deprived of their property or the use of that property because of their race. Instead, their assertion is that the neighborhood is being subjected to equal treatment because of the race of the occupants of these two units.

Now, the legal analysis under the case law, which is required by the homeowners association, involves these

elements. What are the violations that the Walker remedy must fit? That has to be analyzed in the terms of the site selection, the tenant selection and assignment and the Section 8 violations.

Next, the inquiry is, are the race conscious remedies – the second element is what are the race conscious remedies. What measures are being taken? Again, those have to be addressed in terms of site selection, tenant selection and assignment and Section 8 violation.

And then the third element in the analysis. What are the possible alternatives? Is there a less intrusive alternative that would remedy the violation and accomplish the relief?

[p. 19] Now, first, the violations the remedy must fit. In site selection, these are the violations. Without question, the fact that the DHA project, and by projects in this opinion I mean the nonelderly projects because there are, as the attorneys well know, some elderly DHA projects which have been addressed for other purpose. But with that exception, it's undisputed that the overwhelming black population in the projects of DHA is a direct result of deliberate, purposeful racial segregation. DHA has less than 300 public housing units in predominantly white areas which can be offered to black tenants, 300. As to Section 8 certificates and vouchers, DHA has only been able to place just a little more than 19 percent of their Section 8 allotments in white census tracts. This means that the overwhelming majority of public housing units, and some over 80 percent, 82 percent of Section 8 certificates, make an offer to an African-American that can only be used in a black unit or in an apartment in a minority

area. And that has without question been offered, which would perpetuate the segregation policies and practices in this case.

The opinion will have some more examples to make that point, but I'll mention only one of them, a quotation from Mr. Irving Stattman. Mr. Stattman was with the HUD Dallas and Fort Worth offices from 1967 to 1982. Mr. Stattman made this statement when he was asked about the [p. 20] operation of DHA low income housing programs during the period that he was here, 1967 to 1982. His quote is this. "The director of the DHA, when these projects were being developed, specifically stated that the only place he would ever consider putting these projects was in niggertown."

Tenant selection an [sic] assignment violations, again with the exception of the DHA elderly projects, the Section 8 program has been developed and maintained in a manner which preserved the racially segregated occupancy characteristics. The earlier Walker opinions go through the gyrations in detail concerning the different plans that were used from originally a freedom of choice where nobody chose to live in a minority area except the minorities, to a first come first served tenant selection plan which accomplished nothing, then to an effort by DHA to actually steer black applicants to black projects and white applicants to white projects. And it was that as well as the other that I've named that resulted in predominantly one race elderly projects for DHA.

Now, Section 8 violations. DHA first started operating their Section 8 program in 1975. Again in 1978 the DHA lawyer stated in a letter to HUD that DHA had the

obligation, the duty to honor Section 8 certificates outside the City in the suburbs. Despite that, DHA allowed only a few tenants to go to the suburbs. Subsequently DHA completely halted any use of Section 8 certificates in the [p. 21] suburbs.

Beginning in 1978 the City of Dallas conducted the housing quality inspections for the Section 8 apartments. They did this under a contract with DHA. The City inspectors consistently approved units for black families in black neighborhoods which were in serious violation of the HUD housing quality standards. In 1980 HUD ordered DHA to use the Section 8 program to increase housing opportunities for minority public housing residents as part of a Title 6 non-compliance remedy. Instead of complying with that, DHA adopted a new policy, actually an incredible policy, because it required public housing applicants who wanted to use Section 8, it required them to first move out of the public housing and wait at least 90 days before they could even apply for Section 8. The practical effect of that DHA policy was to prohibit most of the public housing residents from giving up their units and attempting to use Section 8 to move in nonsegregated housing.

DHA also engaged in massive violations of the provisions in the 1987 consent decree concerning the use of the Section 8 program. And a very quick summary of the remaining vestiges of these violations in these three areas include this: 92 percent of the black households in DHA's public housing projects reside in predominantly black or minority concentrated areas in the city. These units, these [p. 22] housing projects and their surrounding neighborhoods are substantially inferior to the conditions in which

the low income whites receive HUD assistance. Almost 60 percent of the black households on Section 8 certificates and vouchers live in predominantly black or racially concentrated low income areas. Again, only just over 20 percent of these households are currently using Section 8 certificates in predominantly white areas. In contrast, almost 46 percent of the white DHA Section 8 households live in predominantly white areas.

Now, addressing the race conscious remedy measures that are involved in the decree. HUD has awarded DHA an allocation of development funds for 674 units of new public housing, 674. The first 339 units of this new public housing were allocated in October of 1991. Every one of these units, 674, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as there are in the minority areas. Again, the 674 units must be placed in white nonminority areas until there are as many public housing units in white areas as in minority areas.

If that is ever reached, the question which is totally unknown, because it involves funding that would have to come from HUD, they're not obligated to make the funding available. The point is that the race conscious site [p. 23] selection remedy is limited. It applies only until there is a comparable number of those public housing units in white and in nonminority areas. In addition, DHA must achieve and maintain the conditions of all of its projects to a standard that is substantially equal to the conditions of the HUD assisted projects in predominantly white areas. As I've indicated – as I will indicate, DHA is implementing race conscious site selection in a manner

that attempts to minimize the impact on the surrounding owners.

In stark contrast to the 3500 units that were constructed in West Dallas, DHA is constructing these new units in small complexes of less than 100 units. Frankford-Marsh site has 75 units, the two in question here have 40 units, ne [sic] of them less maybe. DHA is giving the adjoining and nearby property owners the opportunity to have input to provide guidance, to make objections concerning the design, concerning the management, concerning all aspects of these new projects.

DHA has no such process for input of the tenants in any of the minority area projects. DHA itself, not because of orders of this Court, DHA itself is imposing higher qualification on the tenants who are to reside in these new public housing units, higher than any ever dreamed about for any of their other projects.

Each tenant will be required to participate in a [p. 24] family self-sufficiency program. I've already mentioned the educational requirements or the job requirements. DHA is attempting to design these units and to construct them to blend in structurally and aesthetically with the surrounding neighborhoods. The barrack style buildings, most of which are now destroyed at West Dallas, will not be used.

With reference to code enforcement, the City of Dallas is under court order to provide code enforcement on these developments in the same manner and to the same standards and with the same procedures that apply to privately owned rental units.

The race conscious tenant selection and assignment. The existing DHA system uses race in a very limited fashion. It does not use race to move persons up or down on the waiting list. Race is used only if there are housing units available in both the white areas and the minority areas or locations. If that is true, if there are units that are available in white areas or in minority areas, then the person at the top of the list will be offered a unit in the location where the race of at that person does not predominate. However, if that person does not select that unit, that person is not skipped over because of race. In addition, each one of the applicants is given the right to refuse a unit in the 900 units that are now remaining in the West Dallas housing project without losing their place on the [p. 25] waiting list.

Now, there is a preference for Section 8 housing, and every person who accepts a unit in any one of the projects of DHA is automatically placed on the waiting list for Section 8. Race conscious Section 8 mobility program. There are no race conscious limits on who gets Section 8 or any racial preferences for applicants of any race. Mobility services must be provided to black DHA participants for the purpose of achieving and maintaining the percentage of DHA's Section 8 in predominantly white areas. No Section 8 participant is denied the right to use the Section 8 assistance in any area. White participants do not get the mobility service. And there's a reason for that. Under the record in this case, there's no evidence that white Section 8 tenants encounter any problems in finding housing in white nonminority areas, nor is there any record of white Section 8 participants encountering any problem finding houses in the white areas.

In the constitutional analysis, the Court must next address how effective would possible alternatives be. Insofar as public housing is concerned, this Court with the background of this case cannot think of any alternative. The initial remedy in the original 1987 consent decree obligated DHA to construct only 100 units. These units were eventually placed in a white area, but that was done by order of this [p. 26] Court. Indeed, another aspect of this case, HUD, DHA and the City of Dallas continued to propose the development of any new public housing in the predominantly minority West Dallas area. This Court was faced with different propositions, constantly changing, from HUD and often from DHA and the City to build additional units in West Dallas. Any attempt to put public housing in nonminority areas starting from the beginning of DHA has met with strenuous effective neighborhood opposition, political opposition. Absent a Court order, those 100 units would have never been placed in a nonminority area. They would never have been developed in any way.

Tenant selection and assignment, I've mentioned the different alternatives for tenant selection and assignments, and I will not go over those again. As to Section 8, the alternatives, let me again refer to the fact that less than 21 percent of the black families on the Section 8 program currently live in predominantly white areas. In contrast, over 45 percent of the white DHA Section 8 families live in these areas.

Alternative remedial measures. There are some alternatives. I'm not sure how logical they are. One alternative would be for this Court to order that housing – public

housing could only be built in minority racially integrated areas, or this Court could order that these public [p. 27] housing units could only be built in racially mixed areas. Another alternative would be to order that these units be placed in nonminority areas, which is the current agreement of the parties approved by this Court. Another alternative would be to have no public housing at all. If that is the decision of this Court, then these units, all of the public housing units, will be forfeited back to HUD. All of that housing, all of that needed public housing will be lost just like in numerous other instances in the history that I began with, the City of Dallas and DHA have lost and forfeited additional housing opportunities for people who needed it.

The Court has also considered the alternatives offered by the homeowners, and I will address those in the full opinion. None are satisfactory. I will comment on one of the proposals, and this is by one of the experts presented by the homeowners' lawyers. Here's the reasoning of this expert in his testimony before this Court. Public housing is too costly and too intrusive to be used in white areas. Public housing should only be built for those who want to live in the black areas and Hispanic areas. Public housing is not intrusive in the minority areas because there's already public housing there and the property values are already low. His conclusion was that minority householders who want to live in white areas should have to use Section 8 vouchers and that was all.

[p. 28] If the Court were to order the construction of these units in minority areas like West Dallas instead of

nonminority areas, it would perpetuate the racial segregation and discrimination previously found repeatedly by this Court to be illegal. If this Court tried to order that the federal funds which have been appropriated and made available to DHA for this public housing – if I should try to order that those funds should be used for some other program like Section 8 certificates and vouchers, it would be totally improper. The Court has no power to do so. It's a violation of the appropriation clause of the United States Constitution, Article I, Section 9, which prohibits a Court from drawing money from the treasury – the treasury unless there's been an appropriation bill passed by Congress. As much as I may wish I had that power, I do not. Even if this money could be reprogrammed for Section 8, there would still be a need for the use of public housing in the desegregation plan. Section 8, although the preferred method, is not the only method. Indeed, there are members of this class who made it evident, abundantly clear to this Court, that they did not trust Section 8, they would not use Section 8, and they should not be forced to use Section 8.

As to the duration of the remedial order, again the duration is measured by the number of units and by the duration of the consent decree in this case. Judicial [p. 29] supervision in this case will end just like supervision in the DISD case, I'm sure Judge Sanders hopes, will eventually end and perhaps soon.

The test is not whether all of the vestiges of past discrimination have been eliminated. That would be impossible. The test is only whether those effects have been eradicated to the extent that is practicable. The remedial order sets a goal of an additional 3,205 units in

predominantly white areas. The population of the City of Dallas is now approximately 50 percent minority and 50 percent white. That number would be an equal number according to the population mix of the city.

The final opinion will also address many of the concerns of the homeowners association concerning the quality and conditions at these public housing units, and I've indicated some of those, and just hurriedly, DHA does have to maintain the condition of these projects, it has to be substantially equal to the projects in predominantly white areas. If they don't, and indeed they have not in the past, they will be before the Court.

DHA knows that the Court expects it to construct the hese [sic] units in a manner that minimizes the impact they would have on surrounding property owners. I've mentioned the procedure for giving adjoining and nearby property owners the opportunity to provide guidance to have a substantial [p. 30] impact upon the manner which the units are constructed, the quality of the construction, the location, aesthetics of those units.

It is true that theoretically there are possible adverse effects on the value of the homes. That's true whether it's public housing developments and also the Section 8 elements of a remedy on the price of housing can be effected. Developing new units may lower the price of housing for everyone. The Section 8 program may result in higher rents for everyone. There's nothing this Court can do to prevent landlords in white areas to make their own decisions as to whether they want to participate in the Section 8 program or not, unless that decision could be shown to be racially discriminatory. I would be the

first to admit that there's no way that this Court can assure that the federal government will always supply adequate funding for the maintenance of the DHA projects, wherever they are. By the same token, there's also a risk that a private developer may go broke and fail to keep up the maintenance of the units that the private developer places in nearby areas. Indeed, the minority families under the record in this case still face substantial barriers to the use of Section 8 and in nonminority areas.

I will in the full opinion address the further aspects of the adverse impact of public housing on class [p. 31] members. I will address the credibility, the qualifications of the experts that I've heard, and the usefulness, if any, to this Court. And I will also address some of the inconsistencies this Court finds in the claims being made by the homeowners in this case.

Again, I recognize that the values of the home and a financial loss to a homeowners [sic] is a very serious matter. It should be. But I also must recognize that the shameful discrimination against minorities in public low income housing in Dallas and the suburbs is just as serious.

The first hearing in this neverending [sic] Walker litigation concerned the initial settlement. One of the proposals in that settlement was the demolition of 2,600 units at West Dallas. Now these were units that had not been occupied for years. They were units that were empty except for being inhabited periodically by vagrants, perhaps used for purposes of selling drugs. The units were dilapidated. They were not fit for humans to live in them. And despite that conditions which had existed for years

before the hearing, there were hundreds, hundreds of letters this Court received from class members and others who objected to that portion of the decree and objected to the demolition of 2,600 vacant units. A big part of that objection was their concern that the use of Section 8 to replace the demolished public housing units could not be trusted, that it meant nothing to [p. 32] those hundreds and hundreds of people to have the assurance of the plaintiffs' attorneys saying but you will have Section 8 certificates.

A committee called the Committee to Save Public Housing filed detailed written objections to that demolition, and that objection was based entirely on the difference between public housing units and Section 8 certificates and vouchers. The objections were that the actual use of the certificates and vouchers depended upon the supply of private housing actually being available, not just for a few months but through the entire 15-year term of the certificate and voucher. It did them no good to have a certificate or voucher if there was no place to use it for 14 of those 15 years. The committee felt that the availabilty [sic] of these Section 8 units depended upon factors which were not then and have never been under the control of this Court.

One primary thing is a tight rental market, rents higher than allowed by the Section 8 program. If there is a tight rental market for apartments, the owners of the apartments are not willing to take a loss. The Section 8 tenants have no place to go. If they are on a year-to-year lease, they're out. At that hearing the committee, numerous tenants from the public housing in West Dallas, indeed many of whom were sitting in the jury box during

that hearing, officers of the DHA's resident council, a representative who [p. 33] was present to speak for Congressman Martin Frost, the Texas Tenants Union and an outstanding city council member, Lori Palmer, made these objections about Section 8 certificates to this Court.

As a result, I asked the plaintiffs' counsel during that hearing for a commitment that no class member would be forced to take Section 8 certificates or vouchers, would be compelled to take Section 8 certificates and vouchers. The plaintiffs' class attorneys promptly gave me that assurance because they had no intention of doing so. And although they were pressing for the Court's approval of that settlement agreement involving the demolition of those dilapidated units, they understood then, as the Court did, the fact that those concerns were valid and were deeply felt and that they were correct. And this Court made statements in open court, when it approved the consent decree, making it clear that I had given detailed consideration and long consideration to the issue of public housing versus Section 8 certificates and vouchers. I recognized then, as I do now, that although Section 8 certificates and vouchers may be the preferred method for most people, for many people there are risks in Section 8 that not all class members would want to take. I declined to force those risks upon unwilling class members.

In essence, I'm being requested now to forget the commitment which I made to the class at that time and to say [p. 34] that you need to use Section 8 vouchers, and if you do that, fine, if you don't, then you will have nothing. That would be wrong, very wrong. Again I want to emphasize that the use of Section 8 certificates is not new.

It wasn't new the last time. It's not new this time. It's surfaced repeatedly. There are barriers, there are hurdles to the use of Section 8. There must be a willing landlord who is willing to accept Section 8 tenants, requires a landlord who's not motivated by racial discrimination, a landlord who doesn't have all of the units adequately rented without the need for the lower income from Section 8 certificates, requires the landlord who does not want to enforce tenant selection requirements which are fairly standard, such as the tenant's income, the tenant's long-term employment, the tenant's credit rating. Many of those would make the Section 8 unavailable to class members.

For these reasons I will grant the plaintiffs' request for declaratory relief and deny the motions by the homeowners.

Mr. Daniel, I will ask that you prepare an order to that effect. The court reporter will transcribe the comments which I have made. They will be attached as a summary to that order so that the homeowners attorneys may proceed with whatever appeal they wish to take and not wait on either the opinion to be finished this week or next week.

We will stand adjourned.

[p. 35] MR. LYNN: Your Honor, there was just one housekeeping matter.

THE COURT: Okay.

MR. LYNN: There was a motion to stay that was also – we also applied for. I take it that is denied as well.

THE COURT: That is denied as well.

MR. LYNN: Thank you.

THE COURT: We will stand in recess.

CERTIFICATION

I, Joe Belton, certify that during the proceedings in the foregoing styled and numbered cause, I was the official Court Reporter and took in stenograph notes such proceedings and have transcribed the same by computer as shown by the above and foregoingpages [sic] 1 through 35, and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 8th day of September, 1997.

/s/ Joe Belton
U.S. DISTRICT COURT REPORTER
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	§	
	§	
VS.	§	3:85-CV-1210-R
U.S. DEPARTMENT OF	§	
HOUSING AND URBAN	§	
DEVELOPMENT,	§	CLASS ACTION
HIGHLANDS OF	§	
MCKAMEY VI [sic] AND V	§	
COMMUNITY ASSOCIATION,	§	
PRESTON HIGHLANDS	§	
HOMEOWNERS'	§	
ASSOCIATION,	§	
INC., ET AL.	§	

MEMORANDUM OPINION

(Filed Oct. 6, 1997)

Over eight years ago, at the beginning of the opinion in *Walker III*,[1] this Court stated:

> *This is a class action that involves racial discrimination in low-income public housing in the City of Dallas and its suburbs.*

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[1] *Walker v. U.S. Department of Housing & Urban Development*, et al., 734 F. Supp. 1289 (N.D. Tex. 1989) ("*Joinder of the City of Dallas as a Defendant Subject to the Consent Decree*"). See also *Walker I: DHA Violations of the Consent Decree and Appointment of a Special Master*, 734 F. Supp. 1231 (N.D. Tex. 1989).

The history of this tragic discrimination – the deliberate isolation of public housing for the poor *"in niggertown,"*[2] away from the white areas of Dallas and its suburbs – was outlined by this Court at the August 25, 1997 hearing,[3] when it approved two small apartment buildings (no more than 40-units each) on sites selected by Dallas Housing Authority (DHA) for low-income housing in the non-minority areas of far North Dallas. This opinion explains in detail the findings of fact and conclusions of law that support this approval – and the Court's rejection of the attempts of the intervenors, Highlands of McKamay IV and V Community Association and Preston Highland Homeowners Association (the "Homeowners") to enjoin the construction of these two DHA projects near their neighborhoods.

A. Introduction

The class plaintiffs seek declaratory relief that the race conscious portions of the Remedial Order Affecting DHA – specifically, the site selection, tenant selection and assignment, and Section 8 mobility portions – are constitutional. The Homeowners oppose this relief, and they seek to enjoin DHA's development of the small public housing apartments (40 units each) on the two sites near their neighborhoods. DHA supports the class plaintiffs and opposes the Homeowners' request for injunctive

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[2] See Class Plaintiffs' Post Trial Proposed Findings of Fact and Conclusion of Law, p. 10.

[3] A transcript of these oral findings of fact and conclusions of law has been filed as an exhibit to the August 25, 1997 hearing.

relief. Although HUD and the City have taken no position with respect to the Homeowners dispute with the class plaintiffs and DHA, HUD has approved both sites,[4] and it supports the use of both public housing and Section 8 rent-subsidies to remedy the effects of the racial discrimination found in *Walker I* and *Walker III*.

The Homeowners, the class plaintiffs, and DHA agree that the need to remedy the racial segregation and other racial discrimination in DHA's programs is a compelling government purpose which will justify race conscious relief. They also agree that the specific race conscious elements of the DHA Remedial Order must meet the requirement that the remedy "fit the violation in a narrowly tailored manner." *U.S. v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 135 L.Ed. 2d 735 (1996); 64 U.S.L.W. 4638; *U.S. v. Paradise*, 480 U.S. 149, 166, 171 (1987); *Black Fire Fighters Assoc. Of Dallas v. City of Dallas*, 19 F. 3d 992 (5th Cir. 1994).

However, the Homeowners contend that those portions of the Remedial Order which require the construction of new public housing units "is not narrowly tailored" – and that Section 8 certificates are the only permissible "narrowly tailored remedy" that may be used "to cure the vestiges of discrimination" found in *Walker I*. In response, the class plaintiffs and DHA maintain that both types of remedies provided in the DHA Remedial Order, the Section 8 certificates and the small number of units of new public housing, are "narrowly tailored" and

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[4] HUD's approval is subject to DHA's remedial actions to mitigate excessive noise concerns.

necessary remedies. The resolution of this dispute presents one central legal question: *Are the race conscious site selection, tenant selection and assignment, and Section 8 mobility portions of the DHA Remedial Order constitutional?*

B. The Homeowners' asserted interest

The Homeowners assert that the choice of the sites violates their equal protection rights because the sites were chosen, in part, based on race – i.e., the fact that almost all of the current residents of these neighborhoods are *white*.[5] Specifically, the Homeowners allege that these two public housing sites will injure them by causing a diminution in the values of their homes and real property because of these two factors:

(i) supposedly, DHA will fail to properly manage and maintain the physical condition of the public housing units, and

(ii) supposedly, the public housing tenants will be shunned by the non-public housing owners and occupants, and the resulting "social isolation" will cause (or make more

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[5] The Homeowners argue that they are innocent of any complicity in causing the egregious segregation discussed in *Walker I and Walker III*. Although this is true, these Homeowners – as well as the property owners in the other white areas of Dallas – clearly have received the benefits (in their view) of having no public housing in their neighborhoods as a result of the wrongdoing. The tragic racial discrimination of the past effectively built a fence behind which all public housing had to remain in minority neighborhoods; the remedial orders in this case merely attempt to remove that shameful fence. Plaintiffs' 12/12/88 exhibit #5 racial residence lines.

likely) anti-social and illegal conduct by the public housing residents.

In assessing the validity of these claims by the Homeowners, this Court must first place their alleged affected interests in the proper legal context. The Homeowners *do not allege* that DHA is exercising any form of control over their property . . . or that DHA is limiting the use of, or is physically invading, the Homeowners' property . . . or that DHA's development of these two 40-unit public housing projects is, in itself, either a nuisance or an unlawful use of DHA's own property.

Nor do the Homeowners claim any abridgement of their contract rights; the properties purchased by DHA are not within the boundaries of the two neighborhood associations, so they are not subject to the deed restrictions of the associations. And, there is no allegation that DHA's use of the property will violate the applicable zoning or building codes.

In fact, the Homeowners do not even claim some general right to be free from the construction and operation of public housing near their neighborhood.[6] Instead, the only basis upon which the Homeowners rely is the assertion that the race based site selection pursuant to the DHA Remedial Order violates their rights not to be discriminated against because of their race (white), and their

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[6] Indeed, one of the Homeowners' representatives admitted that there were sites in the neighborhoods which could be chosen under a "race blind" process and that, if this were done, the Homeowners would not have any legal basis to oppose the public housing. Plaintiffs' 10/28/96 exhibit #1 – Cherner deposition, pages 56-57, 166.

right not to suffer a supposed loss in property values because of that reverse discrimination.

Of course, this Court recognizes that any type of financial loss to the Homeowners is a serious matter. However, the constitutional protections afforded to property values for consequential damages arising out of lawful government use is limited. Indeed, a diminution in property value alone is simply not sufficient to present a cognizable claim for compensation under the due process provisions of the Fifth or Fourteenth Amendments. *Florida East Coast Properties, Inc., a Florida Corporation v. Metropolitan Dade County*, 572 F.2d 1108, 1111 (5th Cir. 1978) (diminution of property values because of construction of a prison facility near neighborhood did not give rise to a "taking" claim).

This case does not involve the usual issues of affirmative action in which, *because of race,* one person is preferred over another for a job, a promotion, or a place in school. The Homeowners' assertion is that their neighborhoods are being subjected to unequal treatment because of the race of the residents. Their asserted injury occurs because of this area based action, not an individually focused action as in employment discrimination, school segregation, etc.

This case, therefore, involves the question of whether or not a facially race neutral program – public housing – can be used in a race conscious manner, together with Section 8 certifications, to eliminate the racially segregated public housing conditions detailed in *Walker I and III.*

C. The violations that the remedy must fit

Site Selection violations.

As the court has found, the predominantly African-American location and racial composition of DHA's non-elderly projects is a direct result of purposeful racial segregation. *Walker III*, 734 F.Supp 1289 (N.D. Tex. 1989). As a result of past segregationist policies and practices and the failure to accomplish the West Dallas provisions of the decree, DHA has less than 300 units in predominantly white areas which can be offered to African-American non-elderly applicants.[7] DHA's Section 8 certificate and voucher program has been unable to place more than 19% of the Section 8 units in predominantly white census tracts.[8] The lack of integrated housing opportunities in DHA's public housing program means that each offer of a unit to an African-American applicant in the predominantly black projects 9-1 through 9-11 is an offer which perpetuates past segregationist policies and practices in which African-American applicants are assigned to a predominantly black project in a predominantly black area. MSJ 1.[9]

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[7] Plaintiffs' 1/13/92 exhibit #22 – census tract location and occupancy table.

[8] Plaintiffs' 1/13/92 exhibit #20.

[9] The citations to "MSJ ___" in this opinion are to the statements of fact in plaintiffs' motion for summary judgment against the Homeowners. The Homeowners have either admitted or stipulated to many of these facts [plaintiffs' 10/28/96 exhibit ## 88, 89]. Plaintiffs' "CLASS PLAINTIFFS' STATEMENT OF MATERIAL, UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE NORTH DALLAS HOMEOWNERS" combines

Throughout the first half of this century, racial segregation in housing was the official policy of the City of Dallas. State law gave Texas cities the power to enact ordinances providing for residential segregation by race. Tex. Rev. Civ. Stat. Ann. art 1015b (repealed 1969). The 1907 Dallas City Charter expressly provided for the City's power to "provide for the use of separate blocks for residences, places of abode, places of public amusement, churches, schools and places of assembly by members of white and colored races".[10] MSJ 7.

The initial City of Dallas survey and site selection report for the first DHA public housing projects chose the site for the Negro project in a Negro district while recommending that the site for the Mexican project should be located as close as possible to the Mexican district.[11] There were no recommendations for development of a white project site. DHA honored this recommendation and built the Roseland Home project for blacks in a black neighborhood. MSJ 9.

The DHA Board minutes for Oct. 30, 1950 show that DHA was honoring the racial residence lines drawn by the City.

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the plaintiffs' MSJ cites and the Homeowner responses. In addition, those fact statements for which there is no stipulation or admission are established by the evidence cited in support of each of the plaintiffs' statements of fact. The August 13, 1996 MSJ exhibits against the Homeowners are also in the record as plaintiffs' 10/28/96 exhibit # 38.

[10] Plaintiffs' 12/12/88 exhibit #7 – Dallas City Charter, 1952, Section 321.

[11] Plaintiffs' 12/12/88 exhibit #1, pages 11, 13.

> "Mr. Stephenson reported to the members of the Authority that he had a meeting with LLoyd Smoot, his attorney Alfred Sallinger, and approximately 25 white property owners who occupied property lying east of the Smoot property. This committee was representing a group of approximately 100 property owners who opposed the location of Project TEX-9-9 on the northwest corner of Dolphin and Haskell Avenues. He reported that they insisted that the line of demarkation between colored residents and white residents in that area was Haskell Avenue. He reported that he had explained to these people the plan of the Housing Authority to erect a very tall fence and to put shrubs, effectively separating the housing project which may be occupied by Negroes and the property now occupied by these people but he had little success in securing cooperation from them." MSJ 10.

DHA went on to drop the contested site from consideration.[12] MSJ 11.

DHA successfully defended its policy of *de jure* segregation when the legality of the practice was challenged in the early 1940s. *Housing Authority of the City of Dallas v. Higginbotham,* 143 S.W. 2d 95 (Tex. Civ. App. – Dallas 1943). MSJ 12.

The public debate in 1950 and 1951 which led to the creation of the West Dallas project was explicitly premised on the assumption that official action preserving separate residential districts for white and black was

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[12] Plaintiffs' 12/12/88 exhibit #5 – 1950s documents, pages 6-7.

proper and would be forthcoming from the City.[13] MSJ 13.

DHA's 3,500 unit West Dallas public housing project is the nation's largest low-rise public housing project and the second largest project of any type in the nation.[14] It was created by DHA at the City's request.[15] The City and DHA's purpose in developing the West Dallas project was to solve the "Negro housing problem" as that problem was perceived by the white community in Dallas in the early 1950s.[16] MSJ 53.

During the first half of this century, the City of Dallas aggressively pursued an official city policy mandating racial segregation in housing. This policy was subjected to a severe test in 1950 and 1951. MSJ 54.

White residents of South Dallas were publicly demanding that the City of Dallas take action to prevent black families from acquiring homes in white districts.[17] Several bombings of homes bought or built by blacks in white districts were reported.[18] All of the public debate

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[13] Plaintiffs' 12/12/88 exhibit #8 – 1950-1951 newspaper stories; plaintiffs' 12/12/88 exhibit #8 – 1950 Joint Report.

[14] Plaintiffs' 12/12/88 exhibit #44 – DHA Facts in Brief, page 24.

[15] Plaintiffs' 12/12/88 exhibit #5 – 1950s documents, pages 4-5, 13; plaintiffs' 12/12/88 exhibit #10 – 1962-1966 documents, page 1.

[16] Plaintiffs' 12/12/88 exhibit #10 – 1962-1966 documents, page 1.

[17] Plaintiffs' 12/12/88 exhibit #8 – 1950-1951 newspaper articles.

[18] Plaintiffs' 12/12/88 exhibit #8 – supra.

on the resolution of this "Negro housing problem" as it was referred to, was based on the explicit premise that the City of Dallas should take action to make a substantial amount of housing available to black families while maintaining racial segregation.[19] See for example the joint report of the Dallas Chamber of Commerce and the Dallas Citizens Council.[20] MSJ 55.

The Joint 1950 Report stated that one of the fundamental factors to which any successful plan to solve the Negro Housing Problem must adhere was

> "The Committees feel that the only satisfactory and permanent solution to this problem can be realized where there is racial segregation. It is the opinion of the Committees that this basic factor is recognized by the Negro leadership of our community, so long as segregation in that is applied here does not mean discrimination."[21] MSJ 214

While it is apparent from the public accounts of the debate that issues of whether or not the creation of the housing should be left to private industry or should include federally assisted housing and where the housing should be located were open for question, there was universal acceptance of the principle that the solution had to be based on maintaining racial residential segregation in the city.[22] MSJ 56.

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[19] Plaintiffs' 12/12/88 exhibit #8 – supra.

[20] Plaintiffs' 12/12/88 exhibit #9 – Joint 1950 Report.

[21] Plaintiffs' 12/12/88 exhibit #9 – Joint 1950 Report, page 4.

[22] Plaintiffs' 12/12/88 exhibit #8 – supra; plaintiffs' 12/12/88 exhibit #9 – supra.

On Sept. 25, 1950, the City of Dallas requested DHA to combine its existing allocation of 1,800 new construction public housing units for which a site had not yet been selected with 1,700 units of a new allocation and develop the total 3,500 units in West Dallas. DHA agreed.[23] DHA's purpose in acceding to the City request was to solve the "Negro housing problem".[24] MSJ 57.

At that time, West Dallas was not within the Dallas City limits. DHA's application for the federal funding to develop the project described West Dallas in the following terms:

> "The area selected is in what is known as 'West Dallas', a sprawling slum community of approximately five square miles . . . West Dallas is the largest concentration of sub-standard dwellings and slum conditions in and around Dallas . . . ".[25]

This description is supported by a 1948 survey of West Dallas conducted by the Council of Social Agencies.[26] MSJ 58.

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[23] Plaintiffs' 12/12/88 exhibit #5 – 1950s documents, pages 4-5, 10.

[24] Plaintiffs' 12/12/88 exhibit #10 – 1962-1966 documents, page 1.

[25] Plaintiffs' 12/12/88 exhibit #5 – 1950s documents, page 10.

[26] Plaintiffs' 12/12/88 exhibit #45 – 1948 Survey of West Dallas conducted by the Council of Social Agencies and the October 1950 report of the Special Committee of the Dallas Chamber of Commerce and the Council of Social Agencies, plaintiffs' 12/12/88 exhibit #5 – supra, at pages 8-11.

The West Dallas project was funded by the federal government and developed on a *de jure* segregated basis.[27] MSJ 59. *Miers*, supra at 266 S.W.2d 490.

The 1962 public campaign against DHA's 3,000 unit proposal featured numerous ads raising the specter that the units would be integrated and placed in white neighborhoods.[28] MSJ 14.

The 1962 referendum opposing the construction of 3,000 additional units of public housing was endorsed by the Dallas City Council. The opposition was based on the fact that these units would not be placed in West Dallas. The referendum passed and no new low rent non-elderly public housing was built in Dallas from 1955, when West Dallas was opened, until the construction of the Country Creek project [now named Barbara Jordan Square] under the 1987 consent decree in this case. [Walker III, 734 F.Supp. 1296-1297]. MSJ 210.

Irving Statman was a HUD official in either the Dallas or Fort Worth HUD office from 1967 to 1982.[29] Mr. Statman made the following statements about the operation of DHA's low income housing programs during that period:

The director of DHA when the Turnkey projects were being developed specifically stated that the only place he

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[27] Plaintiffs' 12/12/88 exhibit #5 – supra at page 21.

[28] Plaintiffs' 12/12/88 exhibit #11 – 1962 referendum ads.

[29] The Statman deposition has been filed with the District Clerk.

would even consider putting the projects was "in niggertown".[30] MSJ 211.

Mr. Statman recommended that the site be turned down because of location and equal opportunity concerns. HUD approved the site because a HUD official was told that if HUD approved this site, there would be additional units placed in a white area. DHA never requested the additional units.[31] MSJ 212.

In 1978 DHA received an allocation of 224 units of low rent public housing.[32] Had these units been developed they would have been the first new, non-elderly public housing units to be developed by DHA on anything other than a *de jure* segregated basis. Through development of the units, DHA would have been able to offer black tenants the choice of housing in non-impacted areas. DHA was not able to develop these units because the City of Dallas vetoed the use of the units in non-minority areas.[33] DHA allowed the allocation to revert back to HUD.[34] HUD continued to fund the City and DHA. MSJ 41.

In 1980 DHA submitted an application for Section 8 Moderate Rehabilitation Program funds from based on an explicit certification that units located in an area of

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[30] Statman deposition pages 13-14, 34.

[31] Statman deposition pages 34-37.

[32] Plaintiffs' 12/12/88 exhibit #38 – 224 units documents, page 1.

[33] Plaintiffs' 12/12/88 exhibit #38 – 224 units documents.

[34] Plaintiffs' 12/12/88 exhibit #38 – 224 units documents, page 38.

minority concentration would not be selected for the program.[35] None of the units selected for participation in the program were located in the predominantly white priority areas. All of the units were located in low-income or minority concentrated census tracts.[36] MSJ 42.

In 1981 DHA acquired the Oakland Apartments in South Dallas from HUD.[37] It is located in a black census tract and has been predominantly black in occupancy.[38] MSJ 50.

DHA's site selection process honored the racial areas of the City outlined by the Dallas City Manager in 1938. [Walker III, 734 F.Supp. 1293-1294]. MSJ 213.

All of DHA's non-elderly public housing projects were built and maintained on a *de jure* racially segregated basis.[39] *Higginbotham,* supra at 143 S.W.2d 95; *Miers v. Housing Authority of the City of Dallas,* 266 S.W.2d 487, 490 (Tex. Civ. App. – Dallas 1954). MSJ 15.

DHA's scattered site projects were built in white areas only after a court order requiring such placement was entered in the Washington Place case in the early 1980s. *Walker v. HUD,* 734 F.Supp. 1289, 1302 (N.D. Tex. 1989).

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[35] Plaintiffs' 12/12/88 exhibit #40 – Robin Square Apartments documents, page 20.

[36] Plaintiffs' 12/12/88 exhibit #37, supra.

[37] Plaintiffs' 12/12/88 exhibit #22 – 1981 documents, page 2.

[38] Plaintiffs' 12/12/88 exhibit #31 – supra.

[39] Plaintiffs' 12/12/88 exhibit #5, pages 7, 9, 14, 20, 21, 23; plaintiffs' 12/12/88 exhibit #18 – 1975 documents, page 86.

DHA continued its refusal to develop units in white areas even after the 1987 consent decree was entered. DHA violated the decree by failing to locate and develop the 100 units of public housing that were West Dallas replacement units in predominantly white areas. The Court had to order the use of the sites in white areas. *Walker v HUD*, 734 F.Supp. 1231, 1244 (N.D. Tex. 1989).

Tenant selection and assignment violations.

Each of DHA's elderly projects, its Turnkey III project, and its Section 8 program were developed and maintained in a manner which preserved racially segregated occupancy characteristics.[40] DHA's first three elderly projects were occupied under a freedom of choice plan which resulted in predominantly one race occupancy.[41] DHA followed a practice of pre-registration and freedom of choice throughout the 1980s in the assignment of elderly tenants to all of its elderly projects which resulted in predominantly one race occupancy.[42] MSJ 16.

In 1969, when West Dallas was first subjected to a first come, first served tenant selection plan and was becoming all-black in occupancy, a substantial number of

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[40] Plaintiffs' 12/12/88 exhibit #31 – Summary of DHA project occupancy characteristics; plaintiffs' 12/12/88 exhibit #32 – Summary of Section 8 occupancy characteristics by census tract.

[41] Plaintiffs' 12/12/88 exhibit #18 – 1975 documents page 89-90; plaintiffs' 12/12/88 exhibit #31 – supra.

[42] Plaintiffs' 12/12/88 exhibit #33 – Elderly registration documents; plaintiffs' 12/12/88 exhibit #34 – analysis of applicant offers, 1982-1986.

white elderly tenants requested transfers from West Dallas to the new elderly only projects. DHA requested and received HUD approval for the transfers.[43] These transfers had the obvious segregative effects of reducing the white population in the West Dallas project and increasing the white population in the white elderly projects. MSJ 17, 75.

In February, 1980 DHA was preparing to open for occupancy its Section 8 New Construction elderly project, Lakeland Manor.[44] The project is located in a predominantly white location.[45] DHA was faced with the choice of using a waiting list that was composed of persons who had specifically requested Lakeland Manor and who were not in the regular DHA applicant pool or using the regular applicant pool. The Lakeland Manor waiting list was 7% black. The regular applicant pool was 18% black. DHA adopted a plan which gave preference to the whiter Lakeland Manor waiting list rather than the regular, HUD approved waiting list.[46] Upon completion of initial occupancy, Lakeland Manor was predominantly white.[47] MSJ 49.

In 1983 and 1984 DHA began to register applicants for the Audelia Manor elderly public housing project which was under development. Under the registration

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[43] Plaintiffs' 12/12/88 exhibit #14 – 1969 documents 4-9, 14.

[44] Plaintiffs' 12/12/88 exhibit #21 – 1980 documents, pages 7-8, 14-19.

[45] Plaintiffs' 12/12/88 exhibit #31 – supra.

[46] Plaintiffs' 12/12/88 exhibit #21 – 1980 documents, pages 7-8, 14-19.

[47] Plaintiffs' 12/12/88 exhibit #31 – supra.

practices, those registered were allowed to sign up for a vacancy in Audelia Manor without being subjected to the normal waiting list procedures.[48] From its initial occupancy, Audelia Manor was almost exclusively white in occupancy.[49] Audelia Manor is located in a predominantly white census tract.[50] MSJ 51.

Throughout 1982 through 1986 the effect of DHA's tenant selection and assignment plan was, through either allowing freedom or choice or assigning on the basis of race, to steer black applicants to black projects and white applicants to white projects.[51] This steering resulted in predominantly one race elderly projects.[52] MSJ 52.

As the Court found in *Walker I*, DHA violated the Consent Decree approved in this matter by "its delay in putting a new, non-discriminatory *Tenant Assignment & Selection Plan* into effect. 734 F.Supp. 1231, 1232 (N.D. Tex. 1989). The late plan finally presented was defective and violated the decree in several ways. *Id.* at 1235. MSJ 76.

DHA used assignment of tenants by race in order to maintain racial segregation [Walker III, 734 F.Supp. 1297-1300]. The tenant selection and assignment plans were still discriminatory when the suit was filed in 1985. [Walker III, 734 F.Supp. 1300-1301]. MSJ 215.

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[48] Plaintiffs' 12/12/88 exhibit #33 – elderly registration documents.

[49] Plaintiffs' 12/12/88 exhibit #31 – supra.

[50] Plaintiffs' 12/12/88 exhibit #31 – supra.

[51] Plaintiffs' 12/12/88 exhibit #34 – analysis of applicant offers, 1982-1986.

[52] Plaintiffs' 12/12/88 exhibit #31 – supra.

DHA did not even comply on paper with the remedial tenant selection and assignment provisions of the 1987 consent decree until December of 1987. *Walker I*, 734 F.Supp. 1234-1235 (N.D. Tex. 1989).

Section 8 violations.

DHA first began to operate the Section 8 existing program in 1975.[53] In 1978 DHA's attorney stated in a letter to HUD that DHA not only had the authority to honor Section 8 Existing certificates for housing located in the Dallas County suburbs, DHA had the duty to do so in order to comply with its constitutional duty to disestablish the effects of its prior racial segregation.[54] DHA allowed only a few tenants to go to the suburbs and subsequently put a complete halt to the practice.[55] The occupancy patterns of DHA's Section 8 Existing Housing Program were racially segregated.[56] MSJ 44.

Beginning in 1978, the City of Dallas conducted the housing quality inspections for DHA's Section 8 Existing Housing Program under a contract with DHA.[57] The City inspectors consistently approved units for black families

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[53] Plaintiffs' 12/12/88 exhibit #18 – 1975 documents page 138.

[54] Plaintiffs' 12/12/88 exhibit #35 – Sylvia M. Demarest 3/7/78 letter, to Gordon Lewis, page 1, 8.

[55] Plaintiffs' 12/12/88 exhibit #36 – DHA Section 8 suburb documents.

[56] Plaintiffs' 12/12/88 exhibit #32 – Summary of Section 8 occupancy characteristics by census tract, Feb. 1987.

[57] Plaintiffs' 12/12/88 exhibit #24 – supra, 3-4.

in black neighborhoods which units were in serious violation of the HUD housing quality standards. Between Jan. 20, 1987 and Jan. 20, 1988 DHA's own quality control inspections found that 60% of the units which had previously been inspected and passed, most by City inspectors, did not meet housing quality standards upon reinspection.[58]

In 1980 HUD ordered DHA to use its Section 8 program to increase housing opportunities for the minority public housing residents as part of a Title VI non-compliance remedy. Rather than comply, DHA adopted a new policy which required public housing applicants to move out of public housing and wait for 90 days before they could even apply for Section 8. The obvious practical effect of this policy was to prohibit most if not all public housing residents from using Section 8 to move into non-segregated housing. *Walker III*, 734 F.Supp. 1300 (N.D. Tex. 1989).

The 1987 consent decree contained several provisions designed to use the Section 8 program as a means of providing desegregated housing opportunities for class members. DHA engaged in massive violations of those provisions of the consent decree and took other actions which had the clearly foreseeable effect of denying class members housing opportunities in white areas. *Walker v. HUD*, 734 F.Supp. 1231, 1235-1243 (N.D. Tex. 1989).

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[58] Plaintiffs' 12/12/88 exhibit #41 – DHA HQS inspection reports, Q1 and Q2 inspection results.

Remaining vestiges of the violations.

The lingering effects of the violations that remain include:

a. As of 9/27/94, 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[59] resided in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[60] 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[61] The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance.[62] *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

b. As of 9/27/94, at least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program lived in predominantly black or racially concentrated and low income areas. Only 21% of those households lived in predominantly white areas. 45.6% of white DHA Section 8 households lived in predominantly white

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[59] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68 – excerpt from DHA monthly report].

[60] Plaintiffs' 9/27/94 exhibit #79.

[61] Plaintiffs' 9/27/94 exhibit #79.

[62] Plaintiffs' 9/27/94 exhibits ## 62-66, 68-80.

areas. The neighborhood conditions are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside.[63] MSJ 245-280.

D. The race conscious remedial measures

Race conscious public housing site selection.

HUD has awarded DHA the present allocation of development funds for 674 units of new public housing units over a period of time. The first 339 units were allocated in October, 1991. These funds were originally intended for use in West Dallas.[64] MSJ 315.

These units, and any others allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas.[65] The one exception is the possible use of no more than 200 units in the reconfiguration of much smaller West Dallas project.[66] The race conscious site selection remedy is limited. It applies only until there is a comparable number of public housing units in white and minority areas. If DHA and HUD can ensure that a new allocation of Section 8 will be used in predominantly white areas, then Section 8

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[63] Plaintiffs' 9/27/94 exhibits ## 70-73, 76, 78.

[64] Plaintiffs' 1/13/92 exhibit #37; HUD 9/27/94 exhibit #2 - Declaration of Henry G. Cisneros pages 3, 5.

[65] Remedial Order Affecting DHA ¶ A.3.

[66] Remedial Order Affecting DHA ¶ 8.7.

can be used to substitute for future allocations of public housing.[67]

DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas.[68]

DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners.[69] This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There is no such process in the minority areas.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency program.

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[67] Remedial Order Affecting DHA ¶ A.7.

[68] Remedial Order Affecting DHA ¶ B.1.

[69] Hearing Record of Public Housing Steering Committee motion to enjoin construction at Frankford and Marsh site.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units. City Consent Decree ¶ 3.10. This obligation should protect adjoining property owners as well as the project residents.

Race conscious tenant selection and assignment.

The race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate. No one is skipped over because of race. No one is denied housing because of race.[70]

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[71] Each black applicant is given the right to refuse a unit in West Dallas

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[70] Remedial Order Affecting DHA ¶ A.10.

[71] Remedial Order Affecting DHA ¶ B.7.h.

without losing her place on the waiting list. Each white applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list but there is no barrier to the acceptance of such a unit if offered.[72]

The remedy seeks to make use of the limited desegregative housing opportunities that do exist and to prevent anyone from being forced into the West Dallas project.

Because there is a preference for Section 8, every person accepting a unit in any public housing project is automatically placed on the waiting list for Section 8. If the applicant has already applied for Section 8, then the applicant remains on the Section 8 waiting list even though she has moved into public housing.[73] This procedure has worked in the past to allow many families to use public housing only as a temporary expedient and then move to Section 8. *Walker I*, 734 F.Supp. 1246 (N.D. Tex. 1989). Whatever adverse effects will flow from residence in public housing, the participant will be able to end her exposure to those effects by choosing to move to Section 8.

Race conscious Section 8 mobility program.

The racial element of the Section 8 remedy is limited in its scope and its effects. There are no race conscious limits on who gets Section 8 or any racial preferences for

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[72] Remedial Order Affecting DHA ¶ A.10.

[73] Remedial Order Affecting DHA ¶ A.11.

applicants of any race. The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of DHA's Section 8 in predominantly white areas. No Section 8 participant is denied the right to use the Section 8 assistance in any area.[74]

White participants do not get the mobility services required under the decree. There is no record that white Section 8 participants encounter any problems finding housing in white areas.

Black Section 8 participants do not get the use of mobility services to help locate housing in minority areas. There is no record that black Section 8 participants encounter any problems finding housing in minority areas.

All Section 8 participants are provided with the same basic Section 8 program assistance.

E. Efficacy of possible alternatives

Prior record on color blind remedies.

Site selection.

DHA, HUD, and the City have been under the obligation to provide desegregated housing opportunities in public housing since at least 1955 when **de jure** racial segregation in public housing was declared unconstitutional. *Walker v. HUD*, 723 F.Supp. 1289, 1297 n.26 (N.D. Tex. 1989). Despite this obligation, no units of family public housing were developed in white areas until a

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[74] Remedial Order Affecting DHA ¶ C.2.

1984 settlement in a federal lawsuit required the construction of 106 units of public housing in white areas. *Id.* at 1301-1303.

The initial remedy order, the 1987 consent decree, did not require race conscious site selection for any public housing units other than the 100 units allocated as replacement units for West Dallas. While these units were ultimately placed in a white area by court order, HUD, DHA and the City continued to propose the development of all additional new public housing units in the predominantly minority West Dallas area. This was true under the Sextant Plan, the West Dallas Agreement, the Cisneros Plan, and the Lakewest Master Plan.

Any and every attempt to select public housing in white areas, whether under a court order or a color-blind selection process has met with strenuous and effective neighborhood and political opposition. Absent a court order requiring the construction of public housing in white areas, the housing either is developed in minority areas or is not developed at all. *Walker v. HUD*, 723 F.Supp. 1289 (N.D. Tex. 1989).

Tenant selection and assignment

From 1965 to the present, the federal government has relied upon a race neutral tenant selection and assignment plan as its only desegregation procedure in Dallas and in the nation. The federal government admits that the procedure did not operate to desegregate either DHA's public housing program or public housing nationally. These facts have been the subject of a prior summary judgment holding by the Court.

The primary HUD response to the obligation that the *de jure* public housing be disestablished was to require public housing authorities to adopt remedial tenant selection and assignment plans.[75] MSJ 22.

Appendix 2 to the 1985 HUD Report recounts, in detail, the failure of HUD's reliance on tenant selection and assignment plan remedies to disestablish either the *de jure* segregation or its continuing effects.[76] The first plans required the adoption of a freedom of choice tenant selection and assignment plan which allowed each applicant to choose the project or site. These plans resulted in no significant change in public housing occupancy patterns.[77] In 1967 HUD required public housing authorities to adopt a first come, first served tenant selection and assignment approach.[78] It soon became apparent that first come, first served was not accomplishing any more desegregation than did freedom of choice.[79] Despite various attempts over the years to revise HUD's tenant selection and assignment practices, it has remained the same as has the segregation it was intended to cure.[80] MSJ 23.

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[75] Plaintiffs' 12/12/88 exhibit #26 – "SUBSIDIZED HOUSING AND RACE", Office of General Counsel, U.S. Department of Housing and Urban Development, November, 1985, pages 31, 34.

[76] Plaintiffs' 12/12/88 exhibit #27 – Appendix 2, PUBLIC HOUSING TENANT ASSIGNMENT.

[77] 2-11.

[78] 11.

[79] 25.

[80] 35; plaintiffs' 12/12/88 exhibit #26 – supra pages 28-29; plaintiffs' 12/12/88 exhibit #28 – HUD Assessment Report, 1981, pages 2, 3, 7-9, 13.

Under DHA's 1965 desegregation plan, DHA adopted a freedom of choice policy under which an applicant would be able to apply at the project of her choice for that project. Before an applicant of the race that was not the predominant race of the project could be housed at that project, the plan required DHA board notification and approval before accepting the tenant. The plan called for selection of four black families to move, without publicity, into the predominantly white George Loving West Dallas project. An explicit condition of the desegregation plan was that there would be no notice given to applicants that they could apply to the project of their choice. The federal government accepted the DHA plan.[81] The only change in racial occupancy under the freedom of choice plan was in the West Dallas white project. The other white projects, Washington Place and Cedar Springs Place, remained all white and the minority projects remained all minority.[82] MSJ 28, 40.

In 1967 HUD formally rejected the use of freedom of choice tenant selection and assignment plans by public housing authorities on the grounds that such plans did not disestablish racial segregation or its effects in public housing.[83] HUD required all public housing authorities to adopt a first come, first served tenant selection policy using a community wide waiting list for all projects administered by the authority.[84] DHA's board overtly

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[81] Plaintiffs' 12/12/88 exhibit #10 – 1962-1966 documents, pages 20-21, 32, 38-41.

[82] Plaintiffs' 12/12/88 exhibit #31 – supra.

[83] Plaintiffs' 12/12/88 exhibit #27 – supra, pages 7-11.

[84] Plaintiffs' 12/12/88 exhibit #12 – 1967 documents, page 1.

defied HUD's Title VI mandate to cease using freedom of choice and adopt a first come, first served policy.[85] The City of Dallas became involved when HUD threatened to sue DHA and withhold federal funds from DHA and the City.[86] At the request of the City of Dallas, DHA agreed to end freedom of choice and adopt a first come, first served plan.[87] MSJ 29.

The City Attorney, N. Alex Bickley, participated in the negotiations with the U.S. Department of Justice on the specifics of the plan to be adopted.[88] The plan negotiated with Mr. Bickley's assistance and adopted by the DHA board was one which, in the opinion of the Justice Department was "likely to result in little or no change in the racial composition of any of your other locations, all of which are presently segregated".[89] The plan was accepted by the federal government even though it would have little desegregative effect. MSJ 30.

In 1969, HUD found that DHA was not following its formally adopted first come, first served plan but was

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[85] Plaintiffs' 12/12/88 exhibit #12 – 1967 documents, pages 15-37; plaintiffs' 12/12/88 exhibit #13 – 1968 documents, pages 1-24.

[86] Plaintiffs' 12/12/88 exhibit #13 – 1968 documents, pages 15, 23-24, 27, 34.

[87] Plaintiffs' 12/12/88 exhibit #13 – 1968 documents, pages 27, 34.

[88] Plaintiffs' 12/12/88 exhibit #13 – 1968 documents, supra; plaintiffs' 12/12/88 exhibit #14 – 1969 documents, page 1.

[89] Plaintiffs' 12/12/88 exhibit #13 – 1968 documents, page 66.

rather continuing to operate under freedom of choice.[90] While DHA staff were negotiating with HUD and the Justice Department on resolving the new finding of Title VI noncompliance,[91] the DHA board passed a resolution instructing the staff to first ask HUD for a waiver of the first come, first served requirement and that if such a waiver was not immediately forthcoming, to return to freedom of choice.[92] HUD received the request for a waiver but took no action on it.[93] MSJ 31.

In January and February of 1970 DHA obtained HUD final approvals for the site and funding of Cliff Manor, an elderly project.[94] A week after the telegram announcing the final approval, DHA formally rescinded its first come, first served plan and returned to its pre-1968 freedom of choice plan.[95] MSJ 32.

The federal government notified DHA that DHA's actions were in violation of Title VI and HUD seemed to have deferred funding for all projects not already approved.[96] The funding deferral was pointless since

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[90] Plaintiffs' 12/12/88 exhibit #16 – 1970 documents, pages 27-33.

[91] Plaintiffs' 12/12/88 exhibit #14 – 1969 documents 29-34.

[92] Plaintiffs' 12/12/88 exhibit #14 – 1969 documents, pages 47-50.

[93] Plaintiffs' 12/12/88 exhibit #14 – 1969 documents, page 51.

[94] Plaintiffs' 12/12/88 exhibit #16 – 1970 documents, pages 1-3.

[95] Plaintiffs' 12/12/88 exhibit #16 – 1970 documents, pages 4-14.

[96] Plaintiffs' 12/12/88 exhibit #16 – 1970 documents, pagees [sic] 17-19, 20, 23, 38.

DHA had obtained HUD approval for the pending predominantly white elderly projects before DHA returned to its freedom of choice tenant selection plan. As set out below, the only funding actually deferred was the rehabilitation money for West Dallas. MSJ 33.

HUD requested assistance from the City of Dallas in obtaining an end to DHA's blatant violation of Title VI.[97] MSJ 34.

From 1970 through 1974, HUD continued to defer modernization funds for DHA's projects because of DHA's willful noncompliance with Title VI.[98] During this period HUD continued to provide the development and subsidy funding for the predominantly white elderly projects already approved. MSJ 35.

HUD did a Title VI review of DHA and found DHA to be in noncompliance with Title VI.[99] Contrary to its action in 1968 when City funds were immediately at stake, the City took no action to resolve this impasse until late 1974. MSJ 37.

On August 22, 1974, the federal Community Development Block Grant program came into existence. 42 U.S.C. 5304, et seq. The City of Dallas was to receive $195,065,845.00 in funds from this HUD administered

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[97] Plaintiffs' 12/12/88 exhibit #16 – 1970 documents, page 43.

[98] Plaintiffs' 12/12/88 exhibit #17 – 1974 documents, page 1.

[99] Plaintiffs' 12/12/88 exhibit #17 – 1974 documents, pages 3-10, 11.

program over the next 14 years.[100] The CDBG Act prohibited race discrimination by recipients. 42 U.S.C. 5309. MSJ 38.

During the 1970s, one of the conditions for DHA to receive HUD modernization funds for West Dallas was that DHA adopt a tenant selection and assignment plan that would allow HUD to make an administrative determination that DHA in [sic] was in compliance with Title VI.[101] With the assistance of the City of Dallas' Fair Housing Administrator, a City Fair Housing department law student intern, and the assistant City attorney, Mr. Darnall proposed a series of freedom of choice tenant selection and assignment plans.[102] Upon DHA Board adoption of the plans, HUD made the determination that DHA was in compliance with Title VI.[103] The plans did nothing to offer a desegregated housing opportunity to DHA's black residents by DHA's own subsequent admission.[104] MSJ 40.

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[100] Plaintiffs' 12/12/88 exhibit #57 – City CDBG documents.

[101] Plaintiffs' 12/12/88 exhibit #18 – 1975 documents, page 2.

[102] Plaintiffs' 12/12/88 exhibit #18 – 1975 documents, pages 1, 2, 7, 9-15, 18-22, 25-32, 36-37, 42-46, 70; plaintiffs' 12/12/88 exhibit #19 – 1976 documents, pages 1, 11, 34.

[103] Plaintiffs' 12/12/88 exhibit #19 – 1976 documents, pages 44, 71, 73, 80.

[104] Plaintiffs' 12/12/88 exhibit #20 – 1979 documents, pages 4-7. See also MSJ 221-224, 227-224 for efforts to desegregate DHA using a color blind tenant selection method.

Section 8 Mobility.

Despite numerous violations of the 1987 consent decree, DHA did achieve the race neutral goal of 50% of its units in non-Section 8 impacted census tracts. This accomplishment did not erase the effects of discrimination.

Prior to the entry of the Remedial Order Affecting DHA, DHA stated that its goal was merely to comply with the 1987 consent decree requirement to avoid concentrations in census tracts that had 10 or more Section 8 certificates as of January 20, 1987.[105] MSJ 311.

DHA objected to any requirement that a mobility program for its Section 8 participants concentrate on finding available units in predominantly white areas and encouraging class members to move to those areas on the grounds that it was illegal racial steering.[106] DHA expressed concern about the racial steering effect of a program for locating available housing in predominantly white areas, providing information about that housing and the neighborhood services and facilities to African-American families and encouraging African-American families to consider using such housing. MSJ 313.

Following the racially neutral standard replaced one list of Section 8 impacted census tracts with another. In 1987 the highest number of Section 8 certificates in one tract was 235 units in tract 62. In 1994 while there were 59

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[105] 1987 Consent Decree Exhibit B Plan 12.

[106] Testimony of Brenda Campbell 4/8/94 hearing transcript page 42.

certificates/vouchers in tract 62, there were 410 certificates or vouchers in census tract 109. In 1987 the ten most impacted tracts had a total of 1,546 certificates. In May, 1994 the ten most impacted tracts had a total of 1,483 certificates.[107] MSJ 311.

While the overall racial concentration of DHA's certificate holders has improved somewhat, less than 21% of the black families on the program live in predominantly white areas while over 45% of white DHA white Section 8 families live in such areas.[108] The indicators of neighborhood quality in the predominantly white census tracts show that DHA's policy of focusing solely on the Section 8 non-impacted standard has caused class members to be subjected to racially separate and unequal conditions.[109] MSJ 312.

Since 1994 and the entry of the Court's remedial order against HUD, an additional 285 black Section families have been able to find housing in white areas.[110]

Alternative remedial measures.

Race conscious public housing site selection.

There are several logical alternatives to the use of the race conscious site selection requirement in the remedial order. The order could contain no provision controlling

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[107] Plaintiffs' 9/27/94 exhibit #58.

[108] Plaintiffs' 9/27/94 exhibit #78.

[109] Plaintiffs' 9/27/94 exhibits ## 62-66, 68-80, 70-73, 76, 78.

[110] Vol III pages 40-41 – 1335 families now in white areas compared to 1050 as of September 1994.

the racial composition of the areas within which public housing is to be developed. The order could allow or require the housing to be built in minority or racially integrated areas.

The units could be developed in minority areas which would perpetuate the vestige of prior segregation. The use of up to 200 of the units in the West Dallas project will have this effect. The segregative effect is balanced by the remedial effect that the units can have on the living conditions in that part of the West Dallas project which remains. There would be no such countervailing effects from the development of the remaining 474 units in minority areas.

The units can be developed in racially mixed areas. This decision would also involve a race conscious decision, a decision to avoid placing the units in a predominantly white area.

Use of the racially mixed areas in the City of Dallas would not further elimination of the unequal conditions vestige. The racially mixed areas of Dallas are also areas with high concentrations of poverty households, low-income families, high unemployment, high percentages of families on public assistance, and substantial numbers of HUD assisted units already in place.[111]

HUD and DHA did provide alternative remedies which were not accepted.

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[111] Plaintiffs' 9/27/94 exhibits ##84-87.

HUD's proposed remedy for the location vestige.

HUD proposed that an undetermined number of the replacement units for demolished units in the Lakewest Development will be "developed on a scattered site basis in non-impacted neighborhoods."[112] There was no definition of "non-impacted neighborhood" in the plan. The maximum units available would have been the 335 new public housing units in the URD grant.

HUD also proposed that some large number of Lakewest units will be demolished and replaced with an additional 533 vouchers previously promised and 165 URD vouchers.

The net effect of the implementation of this portion of HUD's plan would have been to leave approximately 86% of the family public housing units in predominantly minority and poverty concentrated areas:

	concentrated areas No.	total No.
current	6,133	6,411
total WD demolished	(2,650)	(2,650)
total built in WD	250	250
total built in white		335
new total	3,733 (86%)	4,346

[112] HUD plan I.A.

DHA's proposed remedy for the location vestige.

DHA proposed that HUD provide funding for construction in 50% or greater white or 40% or less black areas for:

a) every unit of new construction developed in West Dallas,[113]

b) 1000 units of replacement housing to reduce the density in Turner, Roseland, Frazier, and/or Rhoads Terrace by one-half.[114] DHA also stated that it "has no funds with which to buy, build or operate public housing or to subsidize housing rentals unless funding is provided by an outside source."[115]

Unless HUD had provided additional funding, which was not in the HUD plan, the only new units would be the 335 URD units, and the effect of the plan would be, at best, the same as the HUD plan. If the Court had approved DHA's request to build the units in areas that are less than 40% black, then the [sic] all of units could have been developed in racially concentrated and low and lower income areas. All of the predominantly Hispanic areas are less than 40% black and there are many areas where the combined Hispanic and black percentages reduce the number of non-Hispanic white to 33% or less.[116]

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[113] DHA plan page 25, ¶ 36.

[114] DHA plan pages 25-26, ¶ 37.

[115] DHA plan page 14, ¶ 64.

[116] Plaintiffs' 9/27/94 exhibit #84.

The use of minority concentrated areas would also conflict with HUD's site selection regulations. These regulations require the consideration of race in its approval decisions. 24 CFR 941.202 "(c) The site for new construction projects must not be located in: (1) An area of minority concentration unless (i) sufficient comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot feasibly be met in that housing market . . . (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area." HUD reviewed the Sites under this regulation.[117] HUD has approved these Sites in white areas.[118] HUD considers these sites appropriate given the Court's finding of discrimination and HUD supports the use of public housing and Section 8 in the remedy.[119]

The units can be developed at sites in predominantly white areas such as the sites at issue.

The Court has already discussed why public housing units need to be in predominantly white areas.

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[117] Hornig and Brewer Declarations filed in support of HUD's responses to DHA's motions for approval of the Hillcrest and McCallum sites. [The regulation does not directly require public housing construction in white areas. It only presents a barrier to housing in minority areas. If the developer does not attempt to build in a white area and the minority sites are rejected, there is no violation of the regulation. This can result and has resulted in no new public housing.]

[118] Vol I, pages 6-7.

[119] Vol III pages 203-204.

> "No one wants low-income public housing in their neighborhood, certainly not a project that may be predominantly black. It should be placed in *someone else's neighborhood – or just kept in the minority areas of town,* as has been done historically by DHA (with the support of the City of Dallas). However, unless this pattern is broken, then public housing in Dallas will continue to be segregated – and, as the inevitable corollary, public housing for minorities will continue to be substandard, at best, and it will never even approach the quality of low-income housing for whites." *Walker v. HUD,* 734 F.Supp. 1289, 1302 (N.D. Tex. 1989).

There is also the logical alternative of no more public housing. The units could be ordered to be forfeited back to HUD or the Court and the parties could just let this happen. This choice will deprive poor families of desperately needed assisted housing. The only basis for this choice would be to keep from constructing the units in white areas. Similar decisions by the City were part of the scheme of racial segregation. *Walker v. HUD,* 734 F.Supp. 1289, 1296, 1301 (N.D. Tex. 1989). Such a decision by the Court would be similarly segregationist.

Homeowner proposals.

The Homeowners have proposed several alternatives: use of color blind site selection methods[120] and conversion of the public housing allocation into either Section 8

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[120] Complaint; plaintiffs' 10/28/96 exhibit #1 – Cherner deposition, pages 21-22, 52, 54-56; construction in minority areas, Vol II, pages 166-174 Thibodeau testimony.

certificates or vouchers or some form of court ordered voucher program.[121] The Homeowners expert Prof. Thibodeau succinctly outlined the combined elements of the Homeowners' proposed least intrusive remedy:

Public housing is too costly and too intrusive for use in white areas.[122] Public housing should be built only for those who want to live in minority areas where it is not intrusive.[123] Public housing is not intrusive in minority areas because there is already public housing there and because property values are lower – there are few $300,000 homes.[124] Minority households who want to live in white area should have to use vouchers.[125] The findings of Prof. Thibodeau's own study make it clear that the minority households who want to live in white areas will face the effects of multiple forms of discrimination by landlords.[126] Upon cross examination Prof. Thibodeau admitted that this less intrusive plan would not remedy the segregation in DHA's programs.[127]

A color blind site selection method would ignore the reality of the issues in the case. Whether or not race is an explicit element of the site selection criteria, any site chosen will be in a white area, a minority area, or a racially mixed area. Ignoring race in the process will not

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[121] Complaint.

[122] Vol II pages 172-173, 167-168.

[123] Vol II pages 166-167, 171-172.

[124] Vol II pages 171-174.

[125] Vol II, pages 167-168.

[126] Vol II pages 183-189; plaintiffs' 10/28/96 exhibit #16.

[127] Vol II page 220.

result in a race neutral location. If the selection method chose sites in minority or racially mixed areas, the choice would continue the racially segregated pattern. Only if the selection method chose sites in predominantly white areas would the vestiges of racial segregation be directly addressed. The record is clear that the choice of white areas for public housing sites has not been accomplished in Dallas absent judicial compulsion.

The use of a color blind remedy would not benefit the Homeowners. The sites at issue could be chosen even if the race conscious site selection language was not in the Remedial Order Affecting DHA. The Order also requires the sites to be selected in areas with less than a 13% poverty population.[128] The Homeowners do not challenge the use of the poverty concentration rate. The Sites are located in census tract 317.98. Of the total population of 20,109, only 655 or 3.26% are below poverty level.[129] 96.74% of the total population is above poverty level.[130]

Jacob Cherner, the designated representative for the Preston Highlands Homeowner Association, testified in a Fed. R. Civ. P. 30(b)(6) deposition that such a race blind

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[128] Remedial Order Affecting DHA ¶ A.3. ["The units may not be located in areas where the poverty rate exceeds 13%, the county average."]

[129] Plaintiffs' August 13, 1996 MSJ exhibit #2 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Age. [The August 13, 1996 MSJ exhibits against the Homeowners are also in the record as plaintiffs' 10/28/96 exhibit #38.]

[130] Plaintiffs' August 13, 1996 MSJ exhibit #2 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Age.

choice of the site would not violate their rights or afford them an [sic] claim for a remedy.

> "Q. Would the sites that are at issue in this lawsuit meet your criteria for use under a color-blind public housing site selection remedy?
>
> A. They could.
>
> Q. You're saying they could as opposed to they would. Why are you saying they could as opposed to they would?
>
> A. They could as opposed to they would because in our definition that we used for our purposes today, we've said that that [sic] the environmental issues would also be met, and although those are not before us right now, I do believe that there are concerns with the two particular tracts, but there is other vacant land near Preston Highlands Homeowners' Association that would certainly fall within the guidelines and be available for purchase.
>
> Q. So if DHA was to pick these sites or the other sites you referred to on a color-blind basis, would these same injuries we talked about earlier also impact the adjoining homeowners?
>
> A. If they picked one of the sites that was in my Homeowners' Association, the injury could be the same, yes, sir."[131]
>
> Q. So, if the site that's across the way from Preston Highlands was selected because it was a good site for public housing and it didn't have

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[131] Plaintiffs' 10/28/96 exhibit #1 – Cherner deposition pages 56-57.

> anything to do with the fact that it's a predominantly white area, that wouldn't be a problem then?
>
> A. I don't think there would be a remedy –
>
> Q. Or a violation of your constitutional rights?
>
> A. Yes, ma'am. No ma'am. I don't think it would be a violation of our constitutional rights for them to have selected that site at random."[132]

If the court ordered construction of units in minority areas, instead of white areas, the perpetuation of the racial segregation previously found to be illegal would continue.

If the Court ordered transmutation of the federal funds allocated for public housing into either another federal housing program or its own program, it would run afoul of the Appropriations Clause of the U.S. Constitution. The Appropriations Clause of the Constitution, Art. I, @ 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law. This rule applies to judicial orders as well as to executive decisions. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

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[132] Plaintiffs' 10/28/96 exhibit #1 – Cherner deposition page 16. [The Homeowners cited this deposition as relevant summary judgment evidence [Response pages 14-15]].

The Homeowners argue that at least some of the public housing units can be changed into Section 8 pursuant to the appropriation statute making those funds available. This argument is based on the deposition statements of Chris Hornig, a HUD official. The Hornig deposition does not discuss a key factor in deciding the question, the appropriation statute. The HOPE VI statute appropriating the funds for the West Dallas grant specifically limited the number of replacement units which could be funded by Section 8. "Provided further, that notwithstanding the provisions of section 18(b)(3) of the Act, units demolished, disposed of or otherwise eliminated under this demonstration may be replaced as follows: and the balance by any combination of conventional public housing and units acquired or otherwise provided for home ownership under section 5(h) of the Act, housing made available **one-third by certificates under section 8 (b)** through housing opportunity programs of construction or substantial rehabilitation of homes meeting essentially the same eligibility requirements as those established pursuant to sections 603-607 of the Housing and Community Development Act of 1987 (Public Law 100-242), or under the HOPE II or III programs as established under sections 421 and 441 of the Cranston-Gonzalez National Affordable Housing Act;".[133]

The West Dallas Hope VI grant included 500 replacement units. The maximum one-third of those units, 135, were Section 8 vouchers. The remainder, 335, must be some form of unit based assistance.

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[133] 106 STAT 1571, 1580 (emphasis added).

The Hope VI argument does not apply to the additional units which were allocated under the usual public housing appropriation. There is no constitutional basis for converting this allocation of appropriated funds into a certificate or voucher program.

Even if the funds could be reprogrammed to Section 8, there would still be the need for public housing in the desegregation plan. As set out in other parts of these findings, Section 8 is subject to various conditions which can make its initial or continued use by class members in white areas difficult. While placing public housing in white areas is also difficult, once placed the units will remain available. There is a need for both Section 8 and public housing in the remedy.

Race conscious tenant selection and assignment.

The record on the failure of race neutral tenant selection and assignment procedures to bring about desegregation in public housing is clear. Given the predominance of black families in DHA's programs and on its waiting lists, even a race conscious tenant assignment plan will not accomplish much desegregation. The Remedial Order does seek to provide opportunities for desegregation when the occasion is present – a vacancy in a white location and a black family at the top of the waiting list or the other way around.

One alternative is to do nothing about tenant selection and assignment in the Remedial order. If this option will not cause or maintain racially identifiable projects,

DHA has that option.[134] Another alternative is to use race more aggressively in the selection process to prevent or reduce racial identifiability by skipping over persons of one race on the waiting list in order to make offers to others whose race would reduce the racial identifiability of the project.[135] This option cannot be used without prior court approval and compliance with conditions ensuring that any persons skipped over because of race will be offered an equivalent housing opportunity. DHA has not yet chosen to seek court approval for either option.

The tenant selection method is not intrusive.

The existing race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate. No one is skipped over because of race. No one is denied housing because of race.[136]

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[137] Each black applicant is given the right to refuse a unit in West Dallas without losing her place on the waiting list. Each white

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[134] Remedial Order Affecting DHA ¶ A.9.

[135] Remedial Order Affecting DHA ¶ A.8.

[136] Remedial Order Affecting DHA ¶ A.10.

[137] Remedial Order Affecting DHA ¶ B.7.h.

applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list but there is no barrier to the acceptance of such a unit if offered.[138]

The existing tenant assignment method seeks to utilize the desegregative housing opportunities that do exist and to prevent anyone from being forced into the West Dallas project.

Race conscious Section 8 mobility program.

The racial element of the Section 8 remedy is limited in its scope and its effects. There are no race conscious limits on who gets Section 8 or any racial preferences for applicants of any race. The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of DHA's Section 8 in predominantly white areas. No Section 8 participant is denied the right to use the Section 8 assistance in any area.[139]

White participants do not get the mobility services required under the decree. There is no record that white Section 8 participants encounter any problems finding housing in white areas.

Black Section 8 participants do not get the use of mobility services to help locate housing in minority areas. There is no record that black Section 8 participants

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[138] Remedial Order Affecting DHA ¶ A.10.

[139] Remedial Order Affecting DHA ¶ C.2.

encounter any problems finding housing in minority areas.

All Section 8 participants are provided with the same basic Section 8 program assistance.

The mobility remedy could continue the race neutral program which was previously in effect. That program had limited results. The alternative chosen, mobility services for black class members seeking housing in white areas, fits the problem. No one is denied housing or housing opportunities because of race.

F. Flexibility, duration, waiver

All of the elements of the remedial order are limited by the general standard for the duration of judicial supervision in a desegregation case.[140] Only reasonable methods need be employed. The test is not whether all vestiges have been eliminated, only whether the vestiges have been eradicated to the extent practical.

Public housing site selection.

Up to 200 of the presently allocated units can be developed in a minority area as part of the reconfiguration of the West Dallas project.[141]

DHA and HUD have the option to propose a plan for Court approval that would use Section 8 certificates and

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[140] Paragraph F.2. and ¶ F.3. set the standard.

[141] Remedial Order Affecting DHA ¶ B.7.

vouchers to substitute for at least part of any future allocations of new public housing in white areas. The plan must meet various requirements to ensure that the Section 8 units will be an actual addition to DHA's housing assistance inventory and that the assistance will actually provide units in white areas.[142]

The race conscious site selection will remain in effect only until a comparable number of units are provided in white areas. The adoption of a Section 8 plan to substitute for future public housing allocations would also limit the duration of this remedial requirement.

Tenant selection and assignment

DHA has several options under this provision, including the option of adopting a freedom of choice plan if there will be no segregative effect.[143] If there is no substantial change in racial identifiability after equalization of conditions, then DHA must propose a magnet project plan for possible Court approval.[144]

Section 8 mobility program.

The Remedial Order recognizes various limitations on DHA's ability to provide Section 8 housing opportunities. Paragraph C.4. recognizes that DHA's ability to

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[142] Remedial Order Affecting DHA ¶ A.7.; Remedial Order Affecting HUD ¶ A.6.

[143] Remedial Order Affecting DHA ¶¶ A.8. – A.10.

[144] Remedial Order Affecting DHA ¶ A.13.

meet the target goals depends on the availability of funding for mobility services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, the choices of the program participants, and the need to avoid concentrations of assisted persons in individual locations.

G. Relationship of numerical goals to the relevant objective standard

Public housing site selection.

The public housing site selection remedy is limited to the development of enough units to create the number of public housing units in white areas that is comparable to the number in minority areas.[145]

The Remedial Order sets a goal of an additional 3,205 units in predominantly white areas. This goal, plus the few units already in predominantly white areas, is equal to the number of non-elderly public housing units in predominantly minority areas.[146] The population of the City of Dallas is now approximately 50% minority and 50% white. The equal number standard reflects this population mix. If race had not been a factor in the original placement of the public housing units, DHA would have been as likely to place a unit in a white area as in a black area.

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[145] Remedial Order Affecting DHA ¶ A.3. – 3,025 units in wite [sic] areas.

[146] The number in predominantly minority areas after the demolition of the West Dallas units and assuming a West Dallas project with 950 units.

The equal number is also consistent with the HUD policy which prohibits approval of units in minority areas unless there is a comparable number of units in white areas.[147] HUD's policy does not require equal numbers in every locality but rather describes a reasonable distribution of units which will approach an appropriate balance. While proportions other than 50-50 might be consistent with policy, 50-50 is within the range of a reasonable distribution which will approach an appropriate balance given the uncontested findings of discrimination in this case.

Goals for Section 8 mobility.

The Remedial Order anticipates the use of numerical goals for the provision of Section 8 housing opportunities in predominantly white areas.[148] The decree does not set out specific goals but calls for a court supervised process to determine goals based on a consideration of the area preferences of the Section 8 eligible persons and participants. That process has not been completed and no numerical goals have been submitted to the Court.

H. Impact on the rights of third parties

There are numerous types of third parties which may be affected by the race conscious elements of the Remedial Order Affecting DHA:

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[147] Plaintiffs' 9/27/94 exhibit # 6. 24 CFR 941.202.

[148] Remedial Order Affecting DHA ¶ C.2.

a) low-income white and other non-class member participants in or applicants for DHA's programs,

b) property owners adjacent to or nearby DHA's existing family projects in minority areas,

c) property owners adjacent to or nearby the sites selected for new public housing developments, and

d) low or lower income tenants seeking to reside in the same rental housing available for Section 8 families in white areas,

e) the landlords of the rental housing available in white areas, and

f) the landlords of the housing located in minority and low-income areas which housing is currently being used for Section 8.

None of the race conscious remedial elements deny housing or housing opportunities to any non-class member participant in DHA's programs. The only DHA benefit which is distributed on a racial basis is the Section 8 mobility program. This restriction is justified on two grounds. There is no showing that non-class members have encountered racial prejudice or other barriers which limit their ability to use Section 8 in white areas. The inclusion of non-class members in the mobility program would divert limited resources away from class members who need the assistance in order to use Section 8 in white areas.

The property owners in the minority areas around the existing DHA family projects will not be directly affected unless the requirement that conditions around

the projects be improved results in neighborhood improvements.[149]

The Court has already considered, in general, the impact of new public housing on property owners in predominantly white areas. *Walker v. HUD*, 734 F.Supp. 1289, 1301-1302 (N.D. Tex. 1989). The Remedial Order Affecting DHA and DHA's implementation of the order limit any adverse effects on adjoining property owners.

DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas.[150]

DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners. This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There is no such process in the minority areas.

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[149] Remedial Order Affecting DHA ¶¶ B.4. – B.6.

[150] Remedial Order Affecting DHA ¶ B.1.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency program.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[151] This obligation should protect adjoining property owners as well as the project residents.[152]

There are theoretically possible economic effects from both the public housing development and the Section 8 elements of the remedy on the price of housing. As discussed below in the section on the Homeowners' experts, developing new units may lower the price of housing for everyone while the Section 8 program may result in higher rents for everyone. None of the experts were willing to hazard a quantified estimate of any of these possible economic impacts. These are the effects of any increase in the low income housing supply, not the race conscious elements of the decree. Eliminating the race conscious elements of the decree would not eliminate

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[151] City Consent Decree ¶ 3.10.

[152] The specific injury allegations of the Homeowners are discussed below.

these effects. Only freezing in the status quo of both the Section 8 program and the public housing program would accomplish an economically neutral remedy. There is no such requirement.

The landlords in the predominantly minority areas may experience a decreasing demand for their units from Section 8 families if the race conscious mobility provisions are effective. The provision of information, tours, and available units in white areas are designed to give Section 8 families more choices. These effects on the landlords will be the result of choices by Section 8 families, not from any compulsion by the remedy order.

The landlords in the predominantly white areas will still be free to choose whether to participate in the Section 8 program unless that decision is racially discriminatory.

The quality control provisions of the order – review inspections,[153] perimeter inspections for code violations,[154] and relocation from crime plagued projects[155] – apply to units in any part of town.

In general, the impacts on third parties are either neutral, positive, or if possibly adverse, limited and diffuse.

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[153] ¶ C.5.

[154] ¶ D.1.

[155] ¶ D.2.

I. Specific issues raised by Homeowners

Asserted injuries to Homeowners' property values.

The Homeowners assert that the location of public housing on the Sites will injure them by causing a decline in property values. They assert that the decline will be caused by DHA's anticipated failure to competently develop, maintain, or manage the units on the Sites. They make the corollary assertion that DHA's announcement of intent to locate public housing on the Sites has already caused a measurable decline in property values. The DHA remedial order and the City Consent Decree contain provisions which, if enforced, should prevent any such failures by DHA. The present administration of DHA has not generally failed to competently develop, maintain, or manage its units. Neither the specific evidence of recent changes in property values nor the general learned studies on the subject confirm these assertions. There is evidence that property values were already declining in the area because of competition from newer housing in other areas.

The Homeowners presented the following evidence on the issue of future property value losses: individual homeowners' assertions that their property values would decline or had declined, Prof. Berry's opinion that there would be some decline in property values, a Ph.D dissertation finding that on a national basis there was little (2% at most) or no decline in property values associated with nearby public housing, and another Ph.D dissertation finding little or no decline in property values around scattered site public housing units in Charlotte, N.C..

Mr. Jacob Cherner asserted that the cause of the loss in value will be either DHA's construction of an eyesore in the community or DHA's failure to maintain the premises.[156] Mr. Cherner pointed out that there also could be a loss of funding for adequate maintenance.[157]

The risk of an eyesore is always with us, no matter who owns the property. Whether or not it is DHA or a private developer who builds on the Sites, there is no requirement that the aesthetics of the buildings do more than comply with local building codes. If DHA builds according to the same building codes and standards then that aspect of the public housing would not be intrusive on the Homeowners.[158] DHA or private developer deviation from those codes can be addressed by litigation to enforce those codes.[159] DHA is not exempt from those codes but neither is DHA held to a higher standard under those codes.[160] DHA is representing that the housing developed will be consistent with the other housing in the area.[161] DHA is working successfully with homeowner groups on design and other development issues at

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[156] Vol I pages 50, 55-65.

[157] Vol I pages 60-63.

[158] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition pages 82-83.

[159] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition pages 68-69, 136-137.

[160] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition pages 64-66.

[161] Vol III pages 94-95 Tim Lott.

the Frankford and March area.[162] The Homeowners did not contradict this testimony.

DHA has failed to adequately maintain its properties in the past. The West Dallas project was a gigantic monument to segregation and neglect. To prevent this from happening in the future, the remedy order and the City consent decree impose specific obligations on DHA to maintain and on the City to enforce maintenance standards. DHA must achieve and maintain the conditions at all of its projects to a standard that is substantially equal to the unit and project conditions at the HUD assisted projects in predominantly white areas.[163] The City of Dallas is already under court order to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[164] This obligation should protect adjoining property owners as well as the project residents.[165]

There is the risk that the federal government will not supply adequate funding for maintenance of DHA's projects. There is the risk that adequate funding for the Section 8 portion of the remedy will not be provided.[166] There is a risk that a private developer will go broke and

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[162] Plaintiffs' 10/28/96 exhibit # 90.

[163] Remedial Order Affecting DHA ¶ B.1.

[164] City Consent Decree ¶ 3.10.

[165] Vol I pages 91-93.

[166] Vol I page 77 Cherner testimony.

fail to maintain structures placed on the Sites.[167] Everyone will be subject to the risks of inadequate funding.

Ms. Ginger Lee's and Mr. David Beer's arguments were the same as Mr. Cherner's.[168]

The Homeowners also presented evidence on the corollary issue of present property value loss caused by the announcement of DHA's plans in support of their allegation of future property value loss. The argument is that if the mere announcement of the proposal will cause property values to decline, then surely the actual development will cause a decline. The strongest and most specific evidence in support of this assertion was the opinion of a real estate agent, Mr. Couch, that property values in the Highlands McKamy neighborhood had already declined. Mr. Couch refused to make a causal connection between the announcement of DHA's plans for the sites and the perceived decline in property values. He claimed only a chronological connection.

> "Q. You're saying that this – that this decrease in selling price is because of DHA's announcement, are you not?
>
> A. I'm saying there is a decrease in the selling price and DHA did make an announcement.
>
> Q. So you're not saying it's because of the announcement?
>
> A. I can't say what the cause of it is."[169]

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[167] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition page 67.

[168] Vol I pages 230-231, Vol II pages 7-8.

[169] Vol II page 40 Couch testimony.

Professor Berry's testimony was based, in part, on the conclusions in the Kamely study which was plaintiffs' 10/28/96 exhibit # 27. Professor Berry did not testify that he had done any independent analysis of the issue for this case.

The Kamely study made the following conclusions, among others.

Kamely hypothesized that the racial composition of a public housing project, if different with that of its neighborhood would have a significant influence on property values of that neighborhood. He found, with no exceptions, the results of all his models suggested that there is no statistically significant difference in median housing prices across census tracts with PHPs based on differences in racial composition of projects and their neighborhoods.[170]

Kamely also made another general finding. "The result of the second model indicates that there is no statistically significant variation in the median housing prices (in census tracts with PHPs) that can be attributed to the relative size of those projects. In other words, public housing projects, generally, have no significant impacts on property values in surrounding areas. This confirms the findings of the majority of previous studies[171] on the housing price effects of PHPS. . . .

The results indicate that the aggregate effects of all attributes related to public housing projects (PHPs) on

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[170] Plaintiffs' 10/28/96 exhibit # 27 page 151.

[171] i.e., Nourse (1963), Schafer (1972), Saunders and Woodford (1979), Sedway (1983), and Babo, et al. (1984).

the property values of neighboring areas are both quite small and statistically negligible. In other words, less than two percent of the median housing price variation across census tracts with PHPs can be explained by variations in the characteristics of PHPs and their residents."[172]

Prof. Berry could not apply the conclusions of the Kamely report to the Homeowners property values because he had no idea of the number of housing units in the relevant census tract and could not input the values necessary to determine the actual impact.[173] Prof. Berry claimed that Kamely found a national average impact on property values of 2%. Even using this national average, a local impact of 0%, 2% or 4% were equally likely.[174]

The other studies cited in Prof. Berry's initial report did not support the allegation of a decline in property values.

The Varady, "Indirect Benefits of Subsidized Housing Program,"[175] article found little support for the belief that there could be positive neighborhood spillover effects but no evidence that there would be negative spillover effects.[176]

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[172] Plaintiffs' 10/28/96 exhibit # 27 page 155.

[173] Vol I pages 187-188.

[174] Vol I pages 188-189.

[175] Journal of the American Planning Association 48: (1982): 432-440.

[176] Vol I pages 176, 177.

The Rabiega, "The Property Value Impacts of Public Housing Projects in Low and Moderate Density Residential Neighborhoods,"[177] article found:

> "From both statistical analyses it is clear that properties in Portland Oregon, gain value after the location of public housing proximate to them." "A policy of dispersed location of small-scale public housing projects in inherently viable neighborhoods, then, compensates local homeowners for some degree of site-related disamentity with neighborhood amenity. This is reflected in sales prices over time. Not all owners are as well compensated, particularly those closest to the projects, but they are not damaged in the particular of property value. The evidence here is that such a policy works."[178]

The Galster, "Subsidized Housing and Racial Change in Yonkers, NY,"[179] article did not mention property values but predicted small increases in the black population of tracts in which court ordered scattered-site public housing is being built.[180]

Prof. Berry's supplemental report cited a study of the effect of scattered site public housing on property values

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177 Land Economics 60 (1984): 174-179.

178 Plaintiffs' exhibit # 25 page 179; Berry testimony Vol I page 178.

179 Journal of the American Planning Association 59 (1993): 172-181.

180 Vol I page 179.

in Charlotte, N.C. This report found little or no evidence that the sites had caused a decline in property values.[181]

Another version of the Puryear study reporting no adverse effect on property values and a January, 1996 article in The Appraisal Journal finding no adverse effects were in the possession of the Homeowners before they filed the lawsuit.[182] Neither article supported their assertion of property value loss.[183]

The cited articles do not support the individual homeowners' concern that they will suffer property value loss in the future.

The Homeowners subsequently offered into evidence the sales data and other information upon which Mr. Couch based his opinion.[184] At the Court's request, additional information was provided and Court's exhibit No. 2 summarizing the Homeowners' data was produced by Dusty Rhodes, the paralegal and investigator for plaintiffs' counsel. This data does show a decline in the price per square foot after DHA's announcement. The price per square foot for 1996 before the announcement was $71.13, after $65.11. The year to date average is $67.52. These figures compare with the 1995 average of $68.88, the 1994

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[181] Plaintiffs' exhibits # 11, # 97 page 92. [Prof. Berry's report criticized the Puryear study for failing to take into account the national economic framework at the time. The report clearly did allow for the effect of national economic trends [plaintiffs' 10/28/96 exhibit # 97 pages 55-56, 73].]

[182] Vol I pages 74-75 Cherner testimony.

[183] Plaintiffs' 10/28/96 exhibits ## 10, 11.

[184] HO # 44.

average of $70.71, and the 1993 average of $69.69.[185] The 1996 year to date average is the lowest of all the years.

Using only the data provided by the Homeowners, the decline from before to after the announcement was 8.5% while the 1996 average was down 2% from 1995, down 4.5% from 1994, and down 3.1% from 1993. However, another exhibit casts doubt on the usefulness of the Homeowners' data or Mr. Couch's conclusions.

Ms. Rhodes filed a declaration stating that the County tax rolls and other sources of data showed that there had been numerous other sales in the area which had not been included in the Homeowners' data. Plaintiffs' 10/28/96 exhibit #107 summarizes the Homeowner data and the other sales during the relevant time period. Mr. Couch used 4 sales for his before the DHA announcement price per square foot. There were at least 3 other sales during that period for which the sales price was not available. Mr. Couch used 6 sales to arrive at a $65.11 average for after the DHA announcement. He failed to include another sale at $78.88 per sq. ft. This sale alone increases the average post DHA sale price to $67.08, a 3% jump. The sale increases the 1996 year to date average from $67.52 to $68.55.

Ms. Rhodes also found numerous additional sales for 1995, 1994, and 1993. While price information was not available for all of the sales, inclusion of the data available changes the year to year comparisons. The 1996 year to date average is $68.55, the 1995 average is $69.20, the 1994 average is $68.82, and the 1993 average is $65.91.

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[185] Court exhibit # 2.

The 1996 year to date average is no longer the lowest of recent years but is within the range of averages for the past years. In fact the post DHA announcement average is more than the 1993 average.[186]

The Homeowners did not introduce any evidence of the effect of DHA's announcement on the sales prices of homes in the other Homeowner Association area, Preston Highlands. Plaintiffs did.

Plaintiffs' 10/28/96 exhibit # 7 is a summary of real estate sales data in the Preston Highlands Homeowner Association area collected by the Homeowners. The price per square foot before the announcement was $63.97, after $66.42, an increase of 3.8%. The before average total sale price was $163,588, after $166,493. The before sale price as a percent of list price was 95.46%, the after percent was 98.02%. While the limited number of sales in the after category limit any generalizations from this report,[187] the data is inconsistent with a decline in property values caused by DHA's announcement.

Plaintiffs also introduced a Preston Highland Homeowners' Association newsletter published after the DHA announcement.[188] The newsletter includes a message from the association president on the issues raised by DHA's announcement. The message includes the following statement under the heading "WHAT CAN YOU DO?". "STAY CALM – Everyone is concerned about home

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[186] Plaintiffs' 10/28/96 exhibit # 107.

[187] There were seven post DHA announcement sales [plaintiffs 10/28/96 exhibit # 7; Vol III page 125].

[188] Plaintiffs' 10/28/96 exhibit # 4.

values, and rightly so. However, the quickest way to ensure that our home values do decrease is to encourage the perception that our values have already been significantly impaired or that we expect our values to decrease. Crying wolf too early to the wrong ears will do no good."[189]

The same newsletter contained an article by a local real estate agent, Carole Beasley with Henry S. Miller Realtors. The article points out that market values have been flat or declining since 1991. She states that the cause is "The severe competition of new/newer homes throughout Collin County is why we do not see market values increasing." Ms. Beasely [sic] also urges the property owners to update their homes. "The look of the early 1980s is not popular in the 1990s, and trying to force feed that look to the potential buyers that are shopping for a home in our area typically does not work."[190]

The evidence does not support a conclusion that DHA's announcement caused a decline in property values. The corollary argument that the development of the public housing will cause a decline in property values is not supported by this argument.

Plaintiffs also introduced a spreadsheet showing the change in property values from 1980 to 1990 for census tracts with public housing. The change in median value is computed for each tract, the City of Dallas, and the County of Dallas.[191] The Kamely study also used census

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[189] Page 3.

[190] Page 5.

[191] Plaintiffs' 10/28/96 exhibit # 8.

tracts with public housing projects as the basis for its conclusions.[192] Dallas County median value increased 60.78%, City of Dallas value by 76.03%. Only 3 census tracts for which there was both 1980 and 1990 data available either decreased in value or failed to increase by at least as much as the Dallas County median value increased. Thirteen census tracts with public housing experienced percent changes in median value higher than the City of Dallas overall average increase. Census tract 16, the location of DHA's Roseland Homes project increased in median home value from $22,900 to $123,600, a 439.74% increase.[193]

Plaintiffs did not introduce any analysis, expert or otherwise, to explain this data. Standing alone it certainly would not support a conclusion that public housing causes property values to increase. As a piece of the evidence, it is consistent with the findings in the previously cited academic studies that there is no necessary decline in property values that is caused by public housing.

The weight of the evidence does not support a finding that the development of public housing has caused or will cause a measurable impact on the property values of the single family homes in the area.

Section 8 efficiency in providing desegregated housing opportunities.

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[192] Plaintiffs' 10/28/96 exhibit # 27.

[193] Plaintiffs' 10/28/96 exhibit # 8.

Summary of argument on Section 8 efficiency.

Section 8 has been most of the additional housing resources provided by HUD to provide desegregated housing opportunities for class members since 1987. The prior record in this case and the record at the 10/28/96 hearing show that the Section 8 program is subject to substantial and specific shortcomings in providing desegregated housing opportunities. The record shows that both Section 8 and public housing can be instruments of segregation and practical means of desegregation. The studies of Section 8 and the similar housing allowance program presented by the Homeowners confirm the experience with Section 8 in this case. Minority families do face substantial discriminatory barriers using Section 8. Neither Section 8 nor housing allowances have been conspicuously efficient at providing desegregated housing opportunities.

The Homeowners counter the experience with Section 8 in this case with several arguments. First, through professors Sa-Aadu and Thibodeau, the Homeowners argue that as a matter of economic principle reflected by the consensus of economic thought, Section 8 is economically more efficient than new construction of public housing. However, the articles, journals, reports, and studies cited show neither superiority as a matter of economic principle or a consensus among economists.

Professor Berry makes two corollary arguments on behalf of the economic efficiency argument. First he argues that class members, like every one else, prefer cash to in-kind. His second conclusion is that new construction of public housing will hurt other poor people by

decreasing the number of units available to them and by raising the rent on the remaining units. Section 8 is argued to have neither effect. Prof. Berry's first conclusion is unremarkable but irrelevant. Cash is not an alternative, only public housing and Section 8. His second argument is not supported by the authority cited and is in fact contradicted by that authority. Construction of new units increases the supply of housing and lowers rents in both the long term and short term. Vouchers raise the price of housing for everyone.

Professor Thibodeau, starting from the premise that new construction is justified only if it is either cheaper than Section 8 or if enough vacant units are not available, attempts to show that neither condition is satisfied in the Dallas area.

Professor Thibodeau uses two data sets in support of his argument that there are vacant units available at rents which can be paid under the Section 8 program. The first data set is a special compilation of 1990 census data which shows where tenants paying Section 8 rents or below were living in 1990. This data set does not even include the area of the Sites. It does not include race data and thus does not show the extent to which black families were able to find housing in white areas.

The second data set is reported occupancy units in apartment complexes in the City of Dallas as of Oct. 17, 1996. While Prof. Thibodeau's analysis of the data is seriously flawed and biased, that same data for various time periods shows a serious lack of available units at Section 8 rents in white areas of the City. The market is particularly tight for 3 and 4 bedroom units. The units

that are available are disproportionately one bedroom units while the class members' need is disproportionately three and four bedroom units.

Professor Thibodeau also argues that the public housing at issue will cost an average of $134,000 a unit to construct which will make these units over twice as expensive as Section 8 units. Prof. Sa-Aadu based his opinions, in part, on Prof. Thibodeau's comparative cost analysis. Prof. Thibodeau's comparative cost analysis fails, in part, because he did not know and the Homeowners did not ask what DHA was going to build.[194] The HUD cost limitations would not allow $134,000 public housing units. DHA's prior experience and plans for new public housing units show that the HUD cost caps can and will be met. Using the HUD cost caps and more realistic assumptions about the operating cost of public housing, the new construction units will be only 20% higher in cost than a FMR unit and almost the same cost as an 120% FMR Section 8 unit.[195]

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[194] Prof. Thibodeau made the estimate without "a clue" of the specific type, size and design of the units DHA will actually build on the sites [Vol II page 106]. He didn't know because neither he nor the Homeowners asked for nor made use of the information that was available [Vol II pages 206-210, 212-213, 225-226, 234-235]. It is incredible that someone would claim to know what its going to cost to build something without knowing what it is you're going to build [Vol II page 124 line 25 to page 125 line 3 Thibodeau testimony].

[195] There are no vacant units renting for FMR in the Sites census tract. There are a few renting at 120% of FMR. The issue is relative cost at providing housing in the area of the Sites, not the cost of Section 8 in low-income minority areas and the cost of public housing in middle class white areas.

The Homeowners' presentation does not support a change in the Court's use of both Section 8 and public housing in the remedy. Neither Section 8 nor public housing is a panacea.

Past record of Section 8.

The first occasion upon which evidence was presented to the Court on the issue of public housing versus Section 8 in the remedial proceedings was in connection with the submission of the proposed HUD and DHA consent decree to the Court on Nov. 6, 1986. The proposed consent decree included provisions which would have lead to the demolition of 2,600 units of public housing in the West Dallas project. The units were to be replaced by a combination of new public housing units in and Section 8 certificates and vouchers.[196]

Hundreds of class members and others signed a written objection to the proposed decree. The objection was based in part on the use of Section 8 to replace the demolished public housing units.[197]

The Committee to Save Public Housing filed a detailed written objection to the proposed consent decree. The objection was premised on the differences between public housing units and Section 8 certificates and vouchers. The objection pointed out that the actual use of certificates or vouchers depended on a supply of private housing being actually available throughout the 15 year

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[196] 1987 Consent Decree ¶¶ 6.B., 7.

[197] Written objections filed with the Court.

term of the certificates and vouchers. The Committee made the irrefutable point that the availability of the units would depend on important factors not under the control of the Court such as the effect of tight rental markets, rents higher than allowed for the program, and racial and other discrimination.[198]

The Committee, public housing tenants, officers of DHA's Resident Councils, the representative of U.S. Congressman Martin Frost, the Texas Tenants Union, and City Council person Lori Palmer presented these objections to the Court at the December 12, 1986 hearing.[199] The Court itself questioned the witnesses on the use of Section 8.[200]

There was already opposition to the use of public housing in other neighborhoods.[201]

The Court elicited plaintiffs' counsels' commitment that no class member would be forced to take a Section 8 certificate or voucher.[202]

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[198] December 4, 1986 Committee to Save Public Housing written objection.

[199] Tr. 12/12/86 Hearing.

[200] Tr. 12/12/86 Hearing, pages 101-102, 146-150. [One of the other objections to the consent decree was that it was not fair to the taxpayers. The cost of the demolition and replacement of the West Dallas units was compared to the lower cost of fixing up the units and leaving them segregated [Tr. 12/12/86 Hearing, pages 112-113].]

[201] Tr. 12/12/86 Hearing, pages 139-140, 152.

[202] Tr. 12/12/86 Hearing, pages 202-203.

Plaintiffs' counsel presented many of the potential problems with the use of Section 8 as replacements for public housing.[203]

The Court's statements in open court approving the consent decree made clear the consideration given to the issues of public housing versus Section 8.[204] The Court specifically recognized that there were risks in Section 8 that not all class members would want to take. The Court declined to force the risks upon unwilling class members.[205] The Court recognized the difficulties inherent in the selection of sites in white areas for the replacement public housing units.[206] The Court recognized and considered the risks and uncertainties of public housing and Section 8.[207]

The Court explicitly considered all of the risks and potential benefits when it approved the replacement of the West Dallas units with a mix of new public housing and Section 8.[208]

The Court's Findings and Conclusions approving the Consent Decree reflected its consideration of the issues involving the use of Section 8 to replace public housing. *Walker v. HUD*, 734 F.Supp. 1231, 1271 (N.D. Tex. 1989).

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[203] Tr. 12/12/86 Hearing, pages 207-213.

[204] Tr. 1/9/87 Hearing.

[205] Tr. 1/9/87 Hearing pages 12-13.

[206] Tr. 1/9/87 Hearing pages 14-15.

[207] Tr. 1/9/87 Hearing pages 15-17.

[208] Tr. 1/9/87 Hearing pages 21-22.

During the first year of the 1987 consent decree, the Court was forced to consider various problems in the implementation of the Section 8 program and the public housing program.[209] The problems included site selection for public housing, provision of mobility services for Section 8, adequacy of Section 8 Fair Market Rents, enforcement of Section 8 Housing Quality standards, discriminatory enforcement of limits on the number of Section 8 participants at complexes in white areas, and under-utilization of the program. These problems combined to put fewer Section 8 units in use at the end of the first year of the Consent Decree than were in use when the Consent Decree was signed.[210]

The problems with the use of public housing units to provide desegregated housing opportunities have surfaced repeatedly in the record of the case. *Walker*, 734 F.Supp. at 1301 – 1303 (opposition to DHA units in white areas based on cost, failure to maintain the units, increased crime, resegregation, lack of amenities).[211]

The problems with the use of Section 8 units to provide desegregated housing opportunities have surfaced repeatedly in the record of the case. In addition to the findings in Walker I, the Section 8 program has been subject to numerous other problems. The record shows that the use of Section 8 in predominantly white areas is subject to many barriers and hurdles. Many of these

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[209] *Id.* At 1233-1245.

[210] *Id.* At 1241.

[211] *Id.* at 1311 (100 unit DHA complex simply too large) Tr. 9/15/95-9/19/95 hearing – opposition to approval of the Frankford and Marsh public housing site.

problems are the ones which the Court was aware of when it approved of the 1987 consent decree.[212] These other barriers arise from the fact that the use of a Section 8 certificate or voucher requires a landlord who is willing to accept the Section 8 tenant and the Section 8 contract with the Housing Authority. These landlords, not under the control of the Housing Authority, may be either be motivated by racial discrimination, adequate occupancy rates achieved without the need to accept either the rent limitations or other requirements of the Section 8 program,[213] or by the desire to enforce tenant selection requirements such as minimum income, long term employment, or high credit rating.[214] Even landlords who want to participate in the Section 8 program may not have the three and four bedroom apartments which are needed by some participants.[215] Whatever the reasons, there is and has been a significant rate of persons with Section 8 certificates who have not been able to find any housing.[216]

The Court's approval of the City Consent Decree required consideration of various measures designed to improve the capability of Section 8 to provide desegregated housing. The City was required to monitor rent levels in predominantly white areas and request HUD for an increase in Section 8 FMRs if necessary to provide

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[212] Tr. 9/27/94 hearing pages 116, 128.

[213] 3/28/88 hearing Tr. Pages 174-175.

[214] 5/28/91 hearing Tr. Pages 74, 101-102.

[215] 5/28/91 Tr. Pages 102-104.

[216] 3/25/88 hearing Tr. Pages 114-115.

units in white areas.[217] The City is required to pay up to $50,000 a year in landlord bonuses in order to obtain 3 and 4 bedroom units in non-minority concentrated areas of Dallas County.[218] The City is required to perform timely code inspections on Section 8 units.[219]

The Court's 1990 approval of the City Consent Decree required consideration of various measures designed to improve the capability of public housing to provide desegregated housing. The City is required to perform code enforcement on DHA's developments and units in the same manner and to the same standards and procedures that apply to privately owned rental units.[220] The City is required to take various actions to improve the conditions in and around DHA's existing projects.[221]

The effectiveness of both Section 8 and public housing in providing desegregated housing opportunities was evaluated by the Court in its decision to vacate the 1987 consent decree. Neither program had eradicated the vestiges of racial segregation under that remedial decree.[222]

The Court considered the relative success of both Section 8 and public housing when it ruled on plaintiffs' motion for summary judgment against HUD and DHA.

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[217] ¶ 3.8.

[218] ¶ 3.9.

[219] ¶ 3.10.

[220] ¶ 3.10.

[221] §§ IV., V.

[222] 4/16/96 Findings and Conclusions: Vacation of the 1987 Consent Decree, pages 8-9.

The undisputed material facts showed that neither program had effectively eradicated the vestiges of racial segregation despite all the previous remedial efforts.[223]

After the liability determination, both HUD and DHA submitted desegregation plans. Plaintiffs objected to each plan. The Court held a hearing on the proposed remedial plans. The record submitted at the hearing included various proposals for the use of Section 8 and public housing in the remedy.

The evidence at the hearing showed that the lingering effects of past discrimination affected both public housing and Section 8:

> (1) 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[224] 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[225] The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive

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[223] 5/26/94 Order Regarding Facts Established by Class Plaintiffs' Motion for Partial Summary Judgment Against DHA and HUD, material undisputed fact Nos. 1, 2.

[224] Plaintiffs' 9/27/94 exhibit # 79.

[225] Plaintiffs' 9/27/94 exhibit # 79.

HUD assistance.[226] *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

(2) At least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas. The neighborhood conditions are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside.[227]

Since September of 1994, the number of black Section 8 participants in white areas has increased only by 285, to 1,335.[228]

The Section 8 record at the hearing.

In order to provide a desegregated housing opportunity, a certificate or voucher must first provide an actual housing unit. A substantial number of DHA's Section 8 certificate or voucher holders do not successfully locate a unit. Most families who successfully use Section 8 find housing within 60 days of certificate or voucher issuance. The success rate for 3 bedroom families is 73%

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[226] Plaintiffs' 9/27/94 exhibits ## 62-66, 68-80.

[227] Plaintiffs' 9/27/94 exhibits ## 70-73, 76, 78.

[228] Vol III page 40.

and 66% for 4 bedroom families.[229] This is lower than the national success rate of 84% for 3 bedroom families.[230] The families who cannot locate an acceptable unit are dropped from the Section 8 program.[231]

There are several reasons for the limited success of Section 8. Section 8 is dependent upon the willingness of landlords to enter into Section 8 contracts and leases. DHA has an ambitious and thorough program to search for and recruit willing landlords.[232] Many landlords will not accept Section 8, at least in white areas.[233] For example, the owner of the new apartment complex close to the Sites refuses to accept Section 8.[234]

Even if a landlord is generally willing to accept Section 8, there are still substantial barriers to the use of Section 8 in white areas. First, the unit must be available at a rent which can be paid under the Section 8 program. There are a very limited number of these units. DHA's July 1996 analysis showed 20 vacant 3 bedroom units, 181 vacant 2 bedroom units, and 253 vacant 1 bedroom units in white areas renting for Section 8 approved amounts.[235] Prof. Thibodeau's August 1996 occupancy data contained only between 52 and 23 three bedroom units in tracts he

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[229] Vol II page 60.

[230] Plaintiffs' 10/28/96 exhibit # 84 page 2.

[231] Vol II pages 71-72 Lori Moon testimony.

[232] Vol III pages 20-26, 34-36 Ann Lott testimony,.

[233] Vol III pages 36-37, 69 Ann Lott testimony; Vol III page 153 Craig Garder testimony.

[234] Plaintiffs' 10/28/96 exhibit # 1 Cherner deposition pages 156-158.

[235] HO # 12.

identified as white, and between 247 and 184 two bedroom units renting at or below Section 8 FMR rents.[236] Between 86 and 63 three bedroom units and 649 to 533 two bedroom units were vacant in white areas at rents equal to or below 120% of FMR on October 17, 1996.[237] This was characterized as a tight rental market even by Professor Thibodeau.[238]

Even assuming that a unit in a white area is vacant for Section 8 rent and that the landlord is willing to accept Section 8, there are still substantial barriers to the use of that unit by a Section 8 family. These barriers include high deposits which can be as much as the entire amount of a month's rent even though the family will be paying only a fraction of that amount.[239] Landlords also use tenant selection criteria which effectively bar many Section 8 families. These criteria include requirements that the head of the household have been employed continuously for the last 12 months and that the household

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[236] Plaintiffs' 10/28/96 exhibit # 19G. [The number of units varies according to the rounding formula used [Vol III pages 134-139, 149-150 Rhodes testimony].]

[237] Plaintiffs' 10/28/96 exhibit # 105. [The use of the 120% FMR level overstates the number of units available. HUD has never approved the use of 120% FMRs [Vol II page 59 Lori Moon testimony]. The vouchers cannot use even the 110% exception rents which have been granted. *Walker I*, 743 F.Supp. 1240. This difference continues today [HO # 1 Fair Market and Exception Rent Rates compared to HO # 2 Payment Standard Section 8 Voucher Program].]

[238] Vol II page 157.

[239] Vol II page 65 Lori Moon testimony.

income be at least three times the amount of the total monthly rent.[240]

At least 80% of DHA's Section 8 families are frustrated in their search for housing in white areas. Because the units are not available in white areas, the families end up using Section 8 in minority areas.[241] These discouraging results occur despite DHA's mobility counseling and landlord outreach efforts.[242]

Section 8 can be as clustered as public housing.[243] Section 8 tenants moving into white areas can experience racial isolation, discrimination, and harassment just as can public housing tenants.[244]

Even small scattered site projects, 3 to 6 units, may not win the acceptance of adjoining white homeowners.[245] Despite this isolation, the tenants are well off and exhibit no more signs of anti-social behavior than any other group of people.[246] The size of the scattered site project is not as important as the characteristics of the neighborhood in which it is located. The Chicago scattered site units in the wealthier areas provide a better

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[240] Vol III pages 36-37; plaintiff's 10/28/96 exhibit # 83 Wellington Place rental criteria and policies.

[241] Vol III pages 38 Ann Lott testimony.

[242] Vol III pages 18-36, 47-48.

[243] Plaintiffs' 10/28/96 exhibit # 6 – spreadsheet.

[244] Plaintiffs' 10/28/96 exhibit # 26 pages 244-249 – Rosenbaum study of Chicago Section 8.

[245] Plaintiffs' 10/28/96 exhibit # 28 – Sue Brady deposition.

[246] Plaintiff s' 10/28/96 exhibit # 28 – Sue Brady deposition.

quality of life for the tenants than the projects in the poorer areas.[247] The only reported survey of tenant satisfaction in scattered site public housing projects in white areas found high satisfaction.[248]

National studies.

The housing allowance and Section 8 studies referred to by the Homeowners' own experts Thibodeau and Sa-Aadu confirm that these demand type housing assistance programs are not necessarily very efficient at providing desegregated housing opportunities.

The Weicher article, cited in opposition to public housing by Professor Thibodeau, actually concludes,

> "Minority households and other special groups can theoretically be better served in new construction programs. In practice, the record has been uneven. Section 8 Existing Housing has served minorities better than the new construction program, and had some modest success in reducing racial and ethnic residential segregation, but many blacks and Hispanics who wanted to participate have been unable to find satisfactory housing. More help for minority households is desirable.
>
> No program works well in tight markets, at least in the short run. New construction programs are notoriously slow; many families are

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[247] Plaintiffs' 10/28/96 exhibit # 28 – Sue Brady deposition.

[248] Plaintiffs' 10/28/96 exhibit # 29 – Lord & Rent study of Charlotte, page 299.

> unable to use vouchers or certificates when vacancy rates are low."[249]

Professor Thibodeau cited Raymond Struyk for the proposition that housing allowances are cheaper than new construction.[250] The Struyk report is unambiguous in its conclusions on the racial issues.[251]

> "Racial discrimination, both perceived and actual, also reduced the mobility of minorities."[252]

> "Unfortunately, after controlling for race, income, and other factors, it was found that households in the worst housing (as measured by the EHAP program's own standards) also had the lowest rates of participation."[253]

> "The housing allowances appear to have had little if any impact on the extent of income and racial segregation, on the length of the journey to work, on neighborhood quality, or on movement between the central city and suburbs."[254]

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[249] Plaintiffs' exhibit # 14 – Weicher, pages 287-288.

[250] Plaintiffs' 10/28/96 exhibit # 20 – Struyk, "Policy Questions and Experimental Responses," in Housing Vouchers for the Poor: Lessons from a National Experiment," 1981.

[251] The EHAP documented the effect of racial segregation on mobility of voucher tenants early in the experiment. A number of suburban jurisdictions refused to participate in the program because EHAP staff could not guarantee that black households would not relocate into their areas [plaintiffs' 10/28/96 exhibit # 20 page 232].

[252] Plaintiffs' 10/28/96 exhibit # 20, page 12.

[253] Plaintiffs' 10/28/96 exhibit # 20, page 12.

[254] Plaintiffs' 10/28/96 exhibit # 20, page 14.

> "We do know, however, that housing allowances enlist households with low housing preferences and the dwellings with the greatest deficiencies at lower rates than others. Hence, the very processes that provide for maximum freedom of choice for individual households may tend to discourage those households whose housing would improve the most by participating."[255]

Prof. Thibodeau had done an earlier study summarizing and analyzing the experiences of minority families in using the housing allowances and Section 8. His report showed the significant barriers which minority families encounter in using allowance/voucher programs.[256]

> "Discrimination adds to the costs of search for minority households. "For certain types of minority households – particularly female-headed households and those wich (Sic) children – the effects of multiple forms of discrimination imply even greater costs."[257]

> "Given this conceptualization of move-related decisions, what is the role of discrimination? Discrimination increases search as well as moving costs, since a household facing discrimination must search more units than households that do not. Landlords practicing discrimination can increase moving costs by requiring higher security and utility deposits. It is also important to note that racial discrimination is only one

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[255] Plaintiffs' 10/28/96 exhibit # 20, page 19.

[256] Plaintiffs' 10/28/96 exhibit # 16.

[257] Plaintiffs' 10/28/96 exhibit # 16, page 14.

type of discrimination prevalent in some housing markets. Households may face discrimination due to sex, presence and number of children, source of income, and possession of pets. The cumulative effect of discriminatory practices can drastically reduce the number of available units. For example, minority female heads of households raising several children may have difficulty locating alternate housing because of racial discrimination, discrimination against female-headed households, or discrimination against children. To the extent that discrimination is more prevalent outside concentrated areas, moves out of such areas are more costly to households."[258]

"EHAP households encountered several types of discrimination. Table V lists the percentage of households reporting discrimination in four EHAP sites. Nearly one half of Pittsburgh households faced discrimination because of children while less than 30% of other households faced similar discrimination. Clearly then, some households are likely to face higher costs because of discrimination, and a large part of the explanation seems to lie in household composition. Given the costs involved, one would expect fewer moves to deconcentrated areas by larger households.

"A comparison of the Demand sites and the Supply sites indicates higher percentages of households report discrimination in tighter housing markets. Pittsburgh and Green Bay were tight markets, where landlords can screen tenants more carefully, while Phoenix and South

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[258] Plaintiffs' 10/28/96 exhibit # 16, page 25.

> Bend were loose markets. The percentages of households reporting discrimination in Pittsburgh and Green Bay are larger than similar Phoenix and South Bend households for each type of discrimination."[259]

The Homeowners also introduced into evidence a 1995 HUD Report to Congress on the use of Section 8 to provide housing choices for minorities outside ghetto areas.[260] The conclusions of the report paralleled the experience with Section 8 in this case. HUD found that a variety of market, social, and policy factors impede the movement of Section 8 families to better neighborhoods. Minority families were particularly subject to the limiting factors. The restrictions included community/political opposition to Section 8 reflecting underlying racial or class prejudice, tight rental markets, landlord preferences, racial discrimination, Section 8 discrimination, impediments of distance and information, program administration, HUD's Fair Market Rent levels, and the existence of Section 8 "submarkets" operated in low-income neighborhoods.[261]

Efficiency as a matter of economic principles.

The abstract issue of economic efficiency is irrelevant to the issues in this case. Professor Thibodeau testified that so long as the housing cost less, Section 8 would be more efficient in economic terms if all of the housing was

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[259] Plaintiffs' 10/28/96 exhibit # 16, page 32.

[260] HO # 16.

[261] HO # 16 pages "FOREWORD", 29-42.

located in a predominantly minority area and perpetuated racial segregation.[262] The issue in this housing desegregation case is the efficiency of the means chosen in providing desegregated housing opportunities in white areas for the black class members.[263] In addition to being irrelevant, neither the assertion of elementary economic proof nor that of unanimous consensus by the experts were true.

Professor Thibodeau cited the 1990 article Apgar, "Which Housing Policy is Best,"[264] in support of his assertion that the voucher/production debate had been unanimously settled in favor of vouchers. The Apgar article does not support the conclusion asserted by Professor Thibodeau. The Apgar article make it clear that the debate about demand (vouchers) versus supply (public housing) housing subsidy programs is still open.

Apgar, citing his own and other HUD research, reaches the following conclusions.

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[262] Vol III pages 216-217.

[263] According to Prof. Berry, economic efficiency is completely compatible with thorough, deep seated, oppressive racial segregation. Prof. Berry pointed out that South Africa was on [sic] of the only three societies in the world that practiced effective urban development planning [Vol I pages 164-165, Berry testimony; plaintiffs' exhibit # 33, page 223]. This efficient planning was used to create and maintain wide ranging, thorough, unequal, and oppressive racial segregation in South Africa [Berry testimony]. The most efficient or effective means is not necessarily the just means [plaintiffs' 10/28/96 exhibit # 33, page 223].

[264] Housing Policy Debate Vol. 1, No. 1 (1990): 1-32, plaintiffs' 10/28/96 exhibit # 13.

> "In metropolitan areas characterized by significant disinvestment in selected neighborhoods, a housing allowance program could further destabilize the housing market by further inducing households to move out of areas with high vacancy rates and low-quality housing and move into areas with low vacancies and strong upward pressure on rents. In this context, a housing allowance arguably could both add to abandonment pressures in some neighborhoods and stimulate excess demand pressures in other neighborhoods and still not evoke, at least in the short run, a positive supply response that would limit price increases."

. . . .

> "While the demand-oriented approach has won the upper hand in recent funding decisions, recent policy studies raise doubts about the validity of earlier findings concerning the likely market effects of housing allowances or vouchers. In light of the deteriorating housing situation of the growing number of low-income renter households, these studies call into question the efficacy of the current reliance on demand-oriented housing assistance."[265]

After analysis, Apgar comes to the following conclusion:

> "In either case, the presumption that vouchers will not trigger rent inflation is called into question, as is the presumption that vouchers represent a more cost-effective method for increasing the well-being of low-income tenants.

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[265] Plaintiffs' 10/18/96 exhibit # 13 – Apgar, page 10.

. . . .

> The recent increase in market rents challenges the proposition that demand subsidies are a cost-effective method of housing assistance. First, rent increases have raised the cost of subsidizing households through use of existing stock and have made new construction programs relatively more attractive. In addition, by expanding the supply of rental housing, subsidized new construction programs may limit future rent increases, benefitting not only recipients, but others in the form of reduced rent payments."[266]

Apgar notes that since the time period analyzed in the EHAP studies, gross rents have increased more than construction costs, reversing the trend that would make supply units more efficient. The rent increases have made the supply subsidies more expensive. Apgar emphasizes the point made by the original analysts of the EHAP data, the relative efficiency of supply versus demand is not a theory true for all time and every place but rather a factual matter that is conditional on program features, administration, and economic conditions.[267]

Apgar cites an example of where subsidized production will provide a needed expansion of the housing market for low income persons while limiting rent increases and without reducing maintenance and repair of existing units – the subsidized production of 3 and 4 bedrooms for low-income families with children in a

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[266] Plaintiffs' 10/28/96 exhibit # 13 – Apgar, page 17.

[267] Plaintiffs' 10/28/96 exhibit # 13 – Apgar, pages 18-19.

market that has little private new construction of this type of housing.[268]

Apgar specifically pointed out that new construction of public housing, a supply program, can benefit the entire low-income housing market. "Just as the Voucher Program may impose costs on nonparticipants by raising prices, supply programs may confer benefits on nonparticipants by lowering or holding in check market price increases."[269]

Apgar also argues that the rent increase burdens of a voucher program may easily "overwhelm the direct effects of the subsidy for participants."[270]

Apgar's conclusion is that the "best" housing policy depends on a balanced approach. "Vouchers may be good in some contexts, but economic theory and recent empirical analysis suggest that they are 'not best at all times and under all situations,' especially when the concept of best is expanded to include both subsidized and nonsubsidized poor."[271]

Professor Thibodeau cites John Weicher for the proposition that production programs failed. The context of the quote gives a more balanced view.

After stating that the voucher/production debate has been at a standstill, Weicher says:

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[268] Plaintiffs' 10/28/96 exhibit # 13 – Apgar, page 20.

[269] Plaintiffs' 10/18/96 exhibit # 13 – Apgar, page 21.

[270] Plaintiffs' 10/28/96 exhibit # 13 – Apgar, page 25.

[271] Plaintiffs' 10/28/96 exhibit # 13 – Apgar, page 28.

"The reason for the stalemate is that neither vouchers nor production programs are a panacea, and advocates of both approaches at least implicitly recognize this. Conversely, critics of both approaches have been able to make telling points.

. . .

Vouchers seem to be less a housing program than an income transfer program for poor people who already live in decent housing. When EHAP began, most housing economists believed that existing housing subsidies would result in substantial housing improvement. Results have been much more modest.

. . .

Minority households and other special groups can theoretically be better served in new construction programs. In practice, the record has been uneven. Section 8 Existing Housing has served minorities better than the new construction program, and had some modest success in reducing racial and ethnic residential segregation, but many blacks and Hispanics who wanted to participate have been unable to find satisfactory housing. More help for minority households is desirable.

No program works well in tight markets, at least in the short run. New construction programs are notoriously slow; many families are unable to use vouchers or certificates when vacancy rates are low."[272]

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[272] Plaintiffs' 10/28/96 exhibit # 14 – Weicher, pages 287-288.

Professor Thibodeau cited some of the cost conclusions from the Mayo study of the EHAP results. He does not give the limiting context in which those conclusions are stated. The Mayo study does not support the position that housing allowances/vouchers are always cheaper or better for those served. Rather, it found that the relative efficiency of the forms of housing assistance depended on the specific facts of given housing and financial markets. The following quotes and summaries from the Mayo study illustrate this point.[273]

"For construction program costs to fall below those of Housing Allowances would require a combination of steady or falling construction costs, interest rates, and operating costs, and a sustained increase in residential rents at a level well in excess of recent rates."[274]

In 1965 new construction only 27 percent more costly, in 1975 55%. Interest rates rose by 68%, construction costs by 104% and fuels and utilities by 71%. Rents rose only 42%.[275]

The new construction inefficiencies arise from the decision to build additional units in markets where units are available at much lower costs. "This suggests that the comparative efficiency of existing housing and construction programs is not fixed either over time or across locations. Thus, any comparative evaluation of housing programs should ultimately be conducted in the context

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[273] Plaintiffs 10/28/96 exhibit # 21.

[274] Page S-3.

[275] Page S-4.

of a more general understanding of how general economic conditions and local housing markets influence the availability and relative costs of both existing and newly built standard housing."[276]

Regarding study conclusions that existing housing has lower costs. "Such observations concerning relative costs should not be taken as conclusive; they are, at heart, empirical observations rather than the inevitable consequences of new construction and existing housing programs."[277]

"Thus what appears to a 'finding' in the comparative cost literature – that existing housing costs are less than new construction costs – may be more highly conditional on program features, administration, and economic conditions than some researchers have acknowledged."[278]

"Analyses based on the earlier data, for example, indicate that costs of construction programs are relatively closer to those of existing housing programs than is the case in analyses using more recent data." Life cycle analysis shows closer relative costs in terms of present discounted values.[279]

"Throughout this analysis, and especially in the discussion of the relative 'efficiency' of housing programs, it must be borne in mind that housing programs have many

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[276] Page S-9.

[277] Page 5.

[278] Page 6.

[279] Page 7.

objective and many outcomes and that costs, equity, and efficiency as defined here are only a few of them."[280]

"Cost comparisons for a particular unit size may not accurately portray the relative costs among programs for other unit sizes. Local housing market conditions may, for example, create a temporary excess or shortage of units of a particular size and quality . . . It could also be the case that price discrimination against households of particular sizes, especially large households, could drive up the cost of existing housing relative to the cost of newly constructed units of particular sizes. In such situations, the total cost of a newly constructed unit could be above that of existing units for some unit sizes and below that for other sizes."[281]

Some situations could be created where investing in new housing rather than leasing represents a desirable strategy. As of 1975, leasing represented a less costly strategy. "Generalizations from the results presented here must, however, be approached with an appreciation for their sensitivity to the level and rate of change in both local factors (construction costs, rents, operating costs) and national factors (interest rates). As the analysis has indicated, relative costs of programs can change rapidly in response to such factors."[282]

"At this stage, therefore, it should not be automatically assumed that existing housing programs are both

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[280] Page 16.

[281] Page 51.

[282] Page 96.

inexpensive and efficient for all groups and in all places.[283]

Another aspect of the analysis which affects the generality of the results is the time of the analysis. As indicated above, 1975 is not a favorable time for comparing costs and efficiency of construction programs vis-a-vis existing housing programs. . . . ."[284]

Prof. Sa-Aadu, an economist, also testified to the same conclusions as Prof. Thibodeau about relative economic efficiency of vouchers and public housing. His conclusions were based on the same EHAP reports and upon Prof. Thibodeau's exaggerated public housing construction costs.[285] Prof. Sa-Aadu did not know of any research or studies on the issue of whether minority voucher holders encountered racial discrimination and other barriers preventing the use of the vouchers to obtain housing in white areas.[286] Prof. Sa-Aadu knew nothing about the specifics of the Dallas housing rental market or local housing construction and financing costs.[287]

Professor Berry testified and reported on two corollary economic arguments. His first conclusion was unremarkable. Given the choice of an in-kind or a cash transfer, people find the cash transfer more useful. At

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[283] Page 187.

[284] Plaintiffs' 10/28/96 exhibit # 21.

[285] HO # 35B Sa-Aadu report; Vol I pages 99-131.

[286] Vol I pages 115-117.

[287] Vol I pages 111, 128-130.

best this conclusion supports the Court's previous finding that many of the class members prefer Section 8 vouchers or certificates over public housing.[288]

Prof. Berry's second major conclusion was that construction of public housing had adverse supply side effects and injured the welfare of the working poor who were not recipients of public housing.[289] This testimony was not supported by the authority cited.[290] As Prof. Berry acknowledged on cross examination, according to the O'Sullivan text, the construction of public housing would both increase the number of units available and lower rents for everyone in the short term and long run. Prof. Berry also acknowledged that, according to O'Sullivan, voucher programs would have the effect of raising rents for everyone.[291]

Thibodeau's analysis of local conditions.

Professor Thibodeau argued that there is no need for public housing in white areas because there are many privately owned units available for Section 8 certificates and vouchers holders. He presented three elements of evidence on this subject: 1) an analysis of 1990 census data showing that there were a substantial number of persons living in parts of Dallas and paying rent in an amount less than or equal to Section 8 Fair Market Rents,

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[288] HO # 36B pages 1, 4.

[289] HO # 36B pages 1, 4-6.

[290] Berry testimony; plaintiffs' 10/28/96 exhibit # 24 – O'Sullivan economic text.

[291] Vol I pages 173-176 Berry testimony.

2) maps showing the location of existing Section 8 participants in 1994, 3) Prof. Thibodeau's analysis of vacancies currently available in Dallas for rents less than or equal to Section 8 Fair Market Rents, 120% of Section 8 Fair Market Rents, and 160% of Section 8 Fair Market Rents.

The 1990 census data and the maps showing Section participants were not useful. Neither the 1990 data nor the maps showed the extent to which black families were able to find housing in white areas.[292] The 1990 census data did not even include the large part of the City of Dallas that is in Collin or Denton County.[293] The sites are located in the portions of the City of Dallas excluded from the PUMS analysis.[294]

Prof. Thibodeau's analysis of vacancy data purported to find numerous units for rent in primarily white and non-poverty census tracts at various rent levels.[295] His analysis was unreliable and his conclusions exaggerated.

Prof. Thibodeau did not analyze the vacant units by bedroom size. This prevented any analysis to determine if the units available were the size of units needed by actual Section 8 families.[296] Plaintiffs did this analysis and it showed a substantial mismatch between vacancies and need. 32% of the Section 8 waiting list (3,365 families) is

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[292] HO # 34B pages 19-21; HO ## 22, 23, 24.

[293] Vol II pages 132-133 Thibodeau testimony; HO # 34C map.

[294] Vol II pages 132-133 Thibodeau testimony.

[295] HO # 34B Thibodeau report page 23.

[296] HO # 34B Thibodeau report page 23; Vol II pages 218-219.

eligible for one bedroom apartments. 61.55% of the FMR vacancies in the white areas (671 X .6155 = 379.8) were one bedroom units. 38.24% of the waiting list needs a two bedroom unit. 29.41% of the FMR vacancies in the white areas (671 X .2941 = 197) were two bedroom units. 21.64% of the Section 8 waiting list families need three bedroom units. 3.33% of the FMR vacancies in white areas (671 X .0333 = 22.3) were three bedroom units. 4.38% of the Section 8 families need four bedroom apartments.[297] Prof. Thibodeau's analysis found no four bedroom units.[298]

Many of Prof. Thibodeau's available units were not really there. Because Prof. Thibodeau built in an extra .5 into his rounding formula, his total vacancy estimate of 8,990 units contained 1,248 units added only as a result of the rounding formula, a difference of 14%.[299] The difference was not uniform across all bedroom categories. Prof. Thibodeau's rounding formula produced 66 three bedroom units in white areas. The normal rounding formula, without the additional 0.5, added up to 43 three bedroom units in white areas, a 34% difference from the Thibodeau total.[300]

DHA did its own vacancy analysis using the same source of vacancy data as was used by Prof. Thibodeau. DHA's analysis showed 20 vacant three bedroom units, 181 vacant two bedroom units, and 253 vacant bedroom

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[297] Plaintiffs' 10/28/94 exhibit #94.

[298] HO # 34B page 23.

[299] Rhodes testimony; plaintiffs' exhibit # 100; arithmetic.

[300] Plaintiffs' 10/28/96 exhibit # 106; arithmetic.

units available at 110% of the Section 8 Fair Market Rent level and in predominantly white areas.[301]

Prof. Thibodeau's analysis and testimony did not include any estimate of how many of the vacant units were actually available to Section 8 families. Prof. Thibodeau was unable to estimate how many of the landlords were willing to accept Section 8. Prof Thibodeau was unable to estimate how many of the landlords had application criteria such as employment requirements, minimum incomes, etc. which would prevent Section 8 families from using those vacant units.[302]

DHA has the obligation to create 3,200 units of assisted housing in predominantly white areas. Any plan for the use of Section 8 instead of public housing for these units will have to show that the units are actually available in white areas for use by black Section 8 families. Professor Thibodeau's analysis did not accomplish this result.

Section 8/public housing cost comparison.

Prof. Thibodeau also presented an analysis of the costs of constructing new public housing on the Sites compared to the cost of either purchasing existing units or using Section 8 vouchers/certificates to provide the housing.[303] He used this analysis to support his opinion

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[301] HO # 12, page 1.

[302] Vol II pages 217-218, 221-222.

[303] HO # 34B pages 10-17.

that new construction was grossly economically inefficient by a factor or more than 2. The analysis does not support the argument.

Prof. Thibodeau based his analysis on estimated total development costs per unit ranging from $76,118.94 for a one bedroom unit to $204,611.03 for a four bedroom unit. His average cost per unit was $136,347.19.[304] These amounts are far in excess of both the maximum amounts which HUD will allow for the development of public housing units and the costs per unit of similar developments by DHA. HUD sets the maximum which may be spent for each unit of new public housing. The maximum cost for the Dallas area range from $61,900 for a one bedroom unit to a $114,150 for a four bedroom unit.[305]

DHA has and will develop units in white areas within the HUD cost limitations. The total development cost for Barbara Jordan Homes was $49,115 per unit. The total development cost for the units in development at the Frankford and Marsh site will be $84,000 per unit.[306] These costs are for housing that is consistent in design with the other housing in the area.[307]

Prof. Thibodeau then proceeded to capitalize the development cost, add other costs which he believed DHA would incur in operating the new units and calculate a per month per unit cost which he compared to the

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[304] HO # 34B, pages 15-16.

[305] Plaintiffs' 10/28/96 exhibit # 82.

[306] Vol III pages 76-78 Tim Lott testimony.

[307] Vol III pages 94-95 Tim Lott testimony.

Section 8 Fair Market Rent.[308] This monthly cost estimate was artificially inflated by the exaggerated construction costs and the inclusion of a security cost of $5,391.97 per year, $449.33 per month, per unit. While DHA and the City will have to provide adequate security and policing for these units, there is nothing in the record upon which this estimate can be based.[309] The Court has not ordered, HUD has not agreed to pay, and DHA has not planned to incur such security costs.

The recalculation of Prof. Thibodeau's monthly cost analysis using the HUD Cost Caps and omitting the security costs is a matter of substituting different amortization amounts and expenses to the same formula.[310] As shown below, the resulting comparison of public housing costs to the average FMR is lowered from 2.37 to 1.23. The ratio of public housing costs to the 120% average FMR drops from 1.97 to 1.02. The cost ratio for 3 bedroom units drops to 1.12 of the 3 bedroom FMR and to 0.93 of the 3 bedroom 120% FMR.

The use of the HUD cost caps also changes Prof. Thibodeau's calculation of the cost of new construction versus the cost of acquisition. The 1, 2, and 3 bedroom discounts for acquisition drop from 54%, 37.6%, and 27.25% to 35%, 6%, and -15.76%. The -15.76% discount for three bedroom units means that it would be cheaper to build new three bedroom units than to acquire existing units.

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[308] HO # 34B, pages 15-16.

[309] Vol II pages 217-218 Thibodeau testimony.

[310] Vol II page 215 Thibodeau testimony.

The more realistic analysis shows that even in simple economic terms the Section 8 advantage over new public housing in white areas of Dallas is narrow. In terms of desegregation efficiency, the advantage disappears. As of June 10, 1996 HUD records showed 6 DHA Section 8 certificate holders in the tract.[311] There were no other HUD assisted housing units in the tract.[312] MSJ 295.

If all 80 public housing units are developed on the Sites, that census tract will have 86 assisted units out of 11,885 total housing units, 0.72%. MSJ 296. The cost of new public housing will provide units which can be used by class members in census tract 317.98 where there are currently no vacant units renting for Section 8 FMRs[313] and few renting for 120% FMR.[314]

Adverse impact of public housing on class member choice.

The Homeowners claim that their major concern is not protecting property values but protecting the class members' right to choose where to live. The claim is made in public statements.[315] The claim is made in testimony.[316] The claim is made in argument.[317] The Homeowners claim that it is now

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[311] Plaintiffs' August 13, 1996 MSJ exhibit # 16 – HUD tabulation.

[312] Plaintiffs' 9/27/94 exhibit # 18 – Housing Assistance Plan for the City of Dallas, page 34.

[313] HO # 34G.

[314] HO # 34H.

[315] Plaintiffs' 10/28/96 exhibits ## 77, 78 KERA transcripts.

[316] Vol I page 66 Cherner.

[317] Vol I pages 18-19 Lynn argument.

plaintiffs' counsel who is telling black people where to live.[318]

The concern is misplaced. The Remedial Order Affecting DHA already protects every class members' right to choose where to live.[319] Because there is a preference for Section 8, every person accepting a unit in any public housing project is automatically placed on the waiting list for Section 8. If the applicant has already applied for Section 8, then the applicant remains on the Section 8 waiting list even though she has moved into public housing.[320] This procedure has worked in the past to allow many families to first use public housing and then move to Section 8. *Walker I*, 734 F.Supp. 1246 (N.D. Tex. 1989). Whatever adverse effects will flow from residence in public housing, the participant will be able to end her exposure to those effects by choosing to move to Section 8.

Violation of their equal protection rights.

In order to be unconstitutional as to the Homeowners, the remedy must not only be race-conscious but it also must violate their equal protection rights. The

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[318] Vol III pages 204-205 Lynn argument. ["It should not be built because it is time for white people such as Mr. Daniel and Mr. Werner and the others to stop telling African-Americans where they should live . . . Now, where do they get off telling an African-American or anyone else that they should move to North Dallas, or that they should move to East Dallas?" [Vol III pages 204-205 Lynn argument].]

[319] Vol II pages 69-70 Lori Moon.

[320] Remedial Order Affecting DHA ¶ A.11.

illicit race conscious purpose must be the intent to treat minorities better than whites by giving minorities preferential treatment and allowing minorities to be judged by lower standards than are applied to whites. *Hopwood v. Texas*, 78 F.3rd 932, 936-938, 947, 957 (5th Cir. 1996) *cert. denied*. Assuming an equal protection violation is shown, the Homeowners are still not entitled to relief if the same result would occur under a race-blind remedy. *Id.* at 932.

The Homeowners are not being denied a job, placed lower on a promotion list, denied admission to a school or denied admission to a publicly assisted housing program. Their asserted injury, a loss of property value, is being caused by otherwise normal and lawful governmental action. Absent the allegation of race discrimination, they would have no claim for compensation. *Florida East Coast Properties Inc., v. Metropolitan Dade County*, 572 F.2d 1108, 1111 (5th Cir. 1978) (since construction of a prison did not infringe property rights, an allegation of diminution in value alone was not sufficient to present a constitutional claim).

The U.S. Supreme Court and the Fifth Circuit have given the framework for determining when local government action with an indirect effect on property values and the quality of urban life violates the equal protection guarantee against racial discrimination. In *Memphis v. Greene*, 451 U.S. 100 (1981) black property owners challenged the City for closing streets which went from black to white neighborhoods. The black homeowners asserted that the closings adversely affected their ability to hold and enjoy their property because of race. *Id.* at 102. In its analysis to determine whether the equal protection principle had been violated by conferring a benefit on whites

because of their race, the Court noted that there was no showing that the benefit, street closings, was not equally available to black property owners. *Id.* at 119, 123.

The Fifth Circuit applied the same reasoning in its evaluation of a claim by black property owners that a grand prix automobile race in their black neighborhood had impaired the use and enjoyment of their homes and inflicted various physical and psychological injuries. The Circuit noted that the equal protection principle mandates similar treatment for those similarly situated. Because the black plaintiffs failed to allege the existence of a similarly situated but differently treated non-minority neighborhood, there could be no equal protection violation. *Samaad v. City of Dallas*, 940 F.2d 925, 941-942 (5th Cir. 1991). The Fifth Circuit held that the essence of an equal protection claim is that other persons similarly situated as the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. The complaint must specifically allege the actual existence of these similarly situated group of persons. *Id.* at 941, 941 n. 31. The Fifth Circuit held that even if there was some discriminatory intent, the Equal Protection Clause would not reach the conduct in the absence of a similarly situated group of whites. *Id.* at 942 n. 32.

The Homeowners have not identified any such set of black persons who are similarly situated and have been treated better. The Homeowners must show that there is an intent to treat minorities better than whites by giving minorities preferential treatment. *Hopwood v. Texas*, 78 F.3rd 932, 936-938, 947, 957 (5th Cir. 1996) *cert. denied* (allowing minorities to be judged by lower standards than are applied to whites).

Equal protection and site selection.

The Homeowners assert that the choice of the Sites violate the Homeowners' right to equal protection under the law because the Sites were chosen, in part, based on the race of the occupants of the area, white. The Homeowners assert that the choice will injure them by causing a diminution in the values of their homes and real property. Accepting this injury for argument purposes, it is important to place the interest affected in its legal context.

DHA is not exercising any form of control over the Homeowners' property. The Homeowners do not allege that DHA is limiting the use of or physically invading the Homeowners' property. The Homeowners do not allege that DHA's development of public housing projects is in itself an unlawful or nuisance use of DHA's own property.

The Homeowners do not claim any abridgement of contract rights. The property purchased by DHA is not within the boundaries of their associations and is not subject to the deed restrictions of the associations. The Homeowners do not claim that DHA's use of the property will violate the zoning or building codes of the City.

The Homeowners do not claim any type of general right to be free from public housing close to their neighborhood. One of the neighborhood homeowners' association representatives admitted that there were sites in the area which could be chosen under a "race blind" process and that the Homeowners would not have any legal basis

to stop the housing.[321] The only basis upon which they rely is that the race based site selection violates their rights not to be discriminated against because of race and not to suffer a loss in property values because of that discrimination.

While any type of financial loss is a serious matter, the constitutional protections afforded to property values for consequential damages arising out of lawful government use is limited. Such a diminution in value alone is simply not sufficient to present a cognizable claim for compensation under the due process provisions of the Fifth or Fourteenth Amendments. *FLORIDA EAST COAST PROPERTIES, INC., a Florida Corporation v. METROPOLITAN DADE COUNTY*, 572 F.2d 1108, 1111, (5th Cir. 1978) (diminution of property values because of construction of a prison facility near neighborhood did not give rise to a "taking" claim).

In order to analyze the Homeowners' equal protection claim, it is necessary to first find the unequal treatment based on race. The relevant comparison in this case would be a showing that black homeowners are not subjected to the presence of public housing in their neighborhoods, that black homeowners are somehow treated better when public housing is placed in their neighborhoods, or that white homeowners are being subjected to racial residential segregation. None of these comparisons can be made in this case.

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[321] Plaintiffs' 10/28/96 exhibit # 1 Cherner 30(b) (6) deposition pages 56-57, 166.

Almost all of DHA's public housing projects are already located in predominantly black neighborhoods and will continue to be located there for the foreseeable future. Even if all of the 674 units were to be constructed in predominantly white areas, there would be less than 1,000 units in those areas. As of the date of the entry of the Remedial Order Affecting DHA, 6,133 of the 6,411 units in DHA's non-elderly public housing projects were in these predominantly black or minority concentrated areas where the poverty rate exceeds 40%.[322] There will still be over 3,000 units of family public housing in minority areas even after the demolition of the West Dallas units. There can be 950 units in the West Dallas project alone if the revitalization plan is approved by the Court. The Remedial Order Affecting DHA allows for up to 200 of the allocated new public housing units to be developed in West Dallas, a predominantly minority location.[323]

The impact, if any, on the Homeowners will be considerably less than that impact of the existing DHA public housing projects on the property owners in the black neighborhoods with existing projects. DHA is implementing the race conscious site selection in a manner that minimizes any impacts on the surrounding property owners.[324] This is in contrast to the implementation of the previous race conscious site selection in black areas. DHA

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[322] Plaintiffs' 9/27/94 exhibit # 79; Remedial Order Affecting DHA Vestige A.

[323] Remedial Order Affecting DHA ¶ B. 7.

[324] Record of the Public Housing Steering Committee motion to enjoin development on the Frankford Marsh site.

is constructing new units in small complexes of less than 100 units. The Frankford and Marsh site will have 75 units. The sites now at issue will have no more than 40 units on each site. The projects in the minority areas ranged in size from 3,500 units to 102 units.

DHA is giving adjoining and nearby property owners the opportunity to provide guidance and input into the design and management of the new projects. There was no and is no such process for property owners in the minority areas.

DHA is imposing higher qualifications on the tenants who will reside in the new public housing units than on those in the other projects. Each tenant in the new units will be required to participate in the Family Self Sufficiency program. There is no such requirement in the minority area projects.

DHA is attempting to design and build the units to blend structurally and aesthetically into the surrounding neighborhoods. The barracks style and design used in the historical black projects will not be used.

The development of public housing on these sites will [sic] little demographic effect on the area.

The census tract within which the Sites are located is Collin County census tract 317.98. MSJ 292.

Census tract 317.98 is 87.91% non-Hispanic white [17,678], 3.59% non-Hispanic black [721], and 3.96% Hispanic origin [796].[325] Of the total population of 20,109,

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[325] Plaintiffs' August 13, 1996 MSJ exhibit # 1 – 1990 U.S. Census CD-ROM STF-3A, Hispanic Origin by Race.

only 655 or 3.26% are below poverty level.[326] 96.74% of the total population is above poverty level.[327] There are no black families below poverty level in this census tract.[328] MSJ 293.

Of the 11,885 total housing units in census tract 317.98, 30.65% [3,643] are single family units.[329] 68.73% [8,168] of the total housing units are multifamily units in this census tract.[330] In this census tract, there are 2,104 units in structures with 50 or more units. There are 1,170 units in structures with 20 to 49 units. There are 2,499 units in structures with 10 to 19 units. There are 1,839 units in structures with 5 to 9 units.[331]

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[326] Plaintiffs' August 13, 1996 MSJ exhibit # 2 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Age.

[327] Plaintiffs' August 13, 1996 MSJ exhibit # 2 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Age.

[328] Plaintiffs' August 13, 1996 MSJ exhibit # 3 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Race of Householder by Family Type and Presence and Age of Children.

[329] Plaintiffs' August 13, 1996 MSJ exhibit # 4 – 1990 U.S. Census CD-ROM STF-3A, Units in Structure, 1 unit detached and 1 unit attached.

[330] Plaintiffs' August 13, 1996 MSJ exhibit # 4 – 1990 U.S. Census CD-ROM STF-3A, Units in Structure, 2 through 50 or more units.

[331] Plaintiffs' August 13, 1996 MSJ exhibit # 4 – 1990 U.S. Census CD-ROM STF-3A, Units in Structure. MSJ 294.

As of June 10, 1996 HUD records showed 6 DHA Section 8 certificate holders in the tract.[332] There were no other HUD assisted housing units in the tract.[333] MSJ 295.

If all 80 public housing units are developed on the Sites, that census tract will have 86 assisted units out of 11,885 total housing units, 0.72%. MSJ 296.

The City average ratio of assisted to total units is 7.5%.[334] MSJ 297.

The 1990 median value of owner occupied housing units in tract 317.98 was $208,400.[335] MSJ 298.

There were 10,869 households with no public assistance income and 84 (0.77%) households with public assistance in tract 317.98.[336] MSJ 299.

The median family income was $70,893 and the median household income was $37,994.[337] MSJ 300.

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[332] Plaintiffs' August 13, 1996 MSJ exhibit # 16 – HUD tabulation.

[333] Plaintiffs' 9/27/94 exhibit # 18 – Housing Assistance Plan for the City of Dallas, page 34.

[334] Plaintiffs' 9/27/94 exhibit # 18 – Housing Assistance Plan for the City of Dallas page 28.

[335] Plaintiffs' August 13, 1996 MSJ exhibit # 5 – 1990 U.S. Census CD-ROM STF-3A Median Value.

[336] Plaintiffs' August 13, 1996 MSJ exhibit # 6 – 1990 U.S. Census CD-ROM STF-3A Public Assistance Income in 1989.

[337] Plaintiffs' August 13, 1996 MSJ exhibit ## 7, 8 – 1990 U.S. Census CD-ROM STF-3A Median Family Income in 1989 and Median Household Income in 1989. MSJ 300.

There were 3,386 owner occupied units (31.06% of occupied units) in tract 317.98 and 7,516 renter occupied units (68.94%).[338] MSJ 301.

Of the 7,516 occupied rental units in the tract, 100 were three bedroom units (1.33%) and 121 were four bedroom units (1.61%).[339] MSJ 302.

Only 2.19% of the labor force in census tract 317.98 is unemployed.[340] MSJ 306. In census tract 317.98 only 2.32% of the total households are headed by single moms with children under 18 years old [254 out of 10,953 total households]. 196 of the 254 households that are headed by single moms with children under 18 years old are white [1.79% of the total households] and 58 are black [.53% of the total households].[341] MSJ 305.

There are no unemployed high-school drop-outs in census tract 317.98.[342] MSJ 307.

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[338] Plaintiffs' August 13, 1996 MSJ exhibit # 9 – 1990 U.S. Census CD-ROM STF-3A Tenure by Bedroom.

[339] Plaintiffs' August 13, 1996 MSJ exhibit # 9 – 1990 U.S. Census CD-ROM STF-3A Tenure by Bedrooms.

[340] Plaintiffs' August 13, 1996 MSJ exhibit # 10 – 1990 U.S. Census CD-ROM STF-3A Sex by Employment Status.

[341] Plaintiffs' August 13, 1996 MSJ exhibit # 11 – 1990 U.S. Census CD-ROM STF-3A Race of Householder by Household Type and Presence and Age of Children, Households.

[342] Plaintiffs' August 13, 1996 MSJ exhibit # 12 – 1990 U.S. Census CD-ROM STF-3A School Enrollment, Educational Attainment, and Employment Status.

There are no vacant and boarded up structures in this census tract where the two challenged Sites are located.[343] Only 8.27% total housing units in this census tract are vacant units.[344] MSJ 308.

The age of the housing is indicated by the median year structures of housing units were built which is 1986 for census tract 317.98.[345] MSJ 309.

There is no equal protection violation because there is no intent to treat whites worse than similarly situated blacks, no effect of subjecting whites to unequal conditions, and no residential segregation of whites.

The municipal services discrimination cases provide a better analogy for this case than do the individual employment or student admission cases. The cases involved claims similar to the Homeowners' claims that a specific neighborhood or part of town were being subjected to purposeful discrimination because of race. In order to succeed, the black plaintiffs in those cases had to show that white neighborhoods were treated better than black neighborhoods by the city. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *affd en banc*, 461 F.2d 1171 (5th Cir. 1971); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1981). If no disparity, then no violation was found. *City of Memphis v. Greene*, 451 U.S. 100 (1981);

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[343] Plaintiffs' August 13, 1996 MSJ exhibit # 13 – 1990 U.S. Census CD-ROM STF-1A Vacant Housing Units.

[344] Plaintiffs' August 13, 1996 MSJ exhibit # 14 – 1990 U.S. Census CD-ROM STF-1A Occupancy Status.

[345] Plaintiffs' August 13, 1996 MSJ exhibit # 15 – 1990 U.S. Census CD-ROM STF-3A Median Year Structure Built.

Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972); *Burner v. Washington,* 399 F.Supp. 44 (D.D.C. 1975).

The race conscious provision of the remedial order does not give blacks a preference or allow them to benefit from lower standards than similarly situated whites. Whites are not subjected to racial segregation under the order. White neighborhoods are not subjected to heavier burdens or fewer benefits than black neighborhoods. The remedial order uses race to achieve equality of treatment, not inequality.

Equal protection and tenant selection and assignment.

The Homeowners' complaint alleges that the use of a race conscious tenant selection method for the public housing on the sites violates the Homeowners' equal protection rights.[346]

The race conscious tenant selection and assignment procedure does not operate to deprive anyone of housing because of race. The existing system uses race in a very limited fashion. It does not use race to move persons up or down the waiting list. Race is used only if there are units available in both white and minority areas or locations. Then the person at the head of the list will be offered a unit in the location where her race does not predominate.[347] No one is skipped over because of race. No one is denied housing because of race. The purpose

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[346] Homeowners' Original Complaint ¶ 31, page 12.

[347] Remedial Order Affecting DHA ¶ A.10.

and effect of the assignment plan is to desegregate the projects.

Each applicant is also given the right to refuse a unit in the remaining 950 units in the West Dallas project without losing her place on the waiting list.[348] Each black applicant is given the right to refuse a unit in West Dallas without losing her place on the waiting list. Each white applicant is given the right to refuse a unit in a predominantly white location without losing her place on the waiting list.[349]

The race consciousness of this plan is race neutral; it prefers neither whites nor blacks. Since it does not use willingness to move into project where the applicant's race does not predominate as preference to move up on the list, this plan has less impact than the race conscious plan approved by the Sixth Circuit. *Jaimes v. LMHA*, 833 F.2d 1203, 1207 (6th Cir. 1987). There are no quotas or other limits on the availability of all of DHA's programs to persons of all races. *Burney v. Housing Authority*, 551 F.Supp. 746, 764 (W.D. Pa. 1982) (striking down integration maintenance quotas); *U.S. v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988) (striking down integration maintenance quotas). The plan does not violate the equal protection rights of DHA's applicants.

The Homeowners have not explained how these policies adversely affect their equal protection rights. One

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[348] Remedial Order Affecting DHA ¶ B.7.h.

[349] Remedial Order Affecting DHA ¶ A.10.

Homeowner representative testifying on behalf of the association stated that the tenant selection and assignment plan did not affect them. The Homeowners were only challenging it as evidence in their case.[350] The Homeowners' should have to explain how a predominantly black occupied project in their neighborhood violates the Homeowners' equal protection rights simply because the occupants are black before they can prevail on this claim.

The tenant selection policy and the predominantly black DHA waiting list will produce predominantly black occupied projects on these sites. The effect will flow primarily from the 90% plus black waiting list rather than the tenant assignment policy [Lori Moon deposition]. The sites in the black neighborhoods are also predominantly black occupied. There is no disparity in treatment. There is no segregative purpose against or effect on the Homeowners. There is no violation of the Homeowners' equal protection rights.

Equal protection and race conscious Section 8 mobility.

The Homeowners' complaint does not ask for any relief against the operation of the race conscious Section 8 mobility program or include those provisions in the stated causes of action or requests for relief. The attack on the race conscious Section 8 mobility is also described as

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[350] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition, page 91.

part of the Homeowners' evidence rather than an infringement of their rights.[351]

The only effect which the mobility program could have on the Homeowners would be to increase the number of black Section 8 participants in the multifamily complexes or other rental housing in the area. This effect would not subject the Homeowners to any form of racial discrimination. The Homeowners are not seeking to occupy the rental housing. The Homeowners are not being subjected to racial segregation by the mobility effort. These provisions do not violate the Homeowners' equal protection rights.

Color blind result.

Even if there was an equal protection violation, the Homeowners are not entitled to relief. The sites at issue could be chosen even if the race conscious site selection language was not in the Remedial Order Affecting DHA. The Order also requires the sites to be selected in areas with less than a 13% poverty population.[352] The Homeowners do not challenge the choice of the specific sites.[353] The Homeowners do not challenge the use of the poverty concentration rate. The Sites are located in census tract 317.98. Of the total population of 20,109, only 655 or

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[351] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition, pages 90-94.

[352] Remedial Order Affecting DHA ¶ A.3. ["The units may not be located in areas where the poverty rate exceeds 13%, the county average."]

[353] July 15, 1996 letter from Michael P. Lynn to Joseph Werner.

3.26% are below poverty level.[354] 96.74% of the total population is above poverty level.[355]

Jacob Cherner, the designated representative for the Preston Highlands Homeowner Association, testified that such a race blind choice of the site would not violate their rights or afford them a remedy.

> "Q. Would the sites that are at issue in this lawsuit meet your criteria for use under a color-blind public housing site selection remedy?
>
> A. They could.
>
> Q. You're saying they could as opposed to they would. Why are you saying they could as opposed to they would?
>
> A. They could as opposed to they would because in our definition that we used for our purposes today, we've said that the environmental issues would also be met, and although those are not before us right now, I do believe that there are concerns with the two particular tracts, but there is other vacant land near Preston Highlands Homeowners' Association that would certainly fall within the guidelines and be available for purchase.
>
> Q. So if DHA was to pick these sites or the other sites you referred to on a color-blind basis, would these same injuries we talked about earlier also impact the adjoining homeowners?

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[354] Plaintiffs' August 13, 1996 MSJ exhibit # 2 – 1990 U.S. Census CD-ROM STF-3A, Poverty Status in 1989 by Age.

[355] Plaintiffs' August 13, 1996 MSJ exhibit # 2 – 1990 U.S. Cednsus [sic] CD-ROM STF-3A, Poverty Status in 1989 by Age.

A. If they picked one of the sites that was in my Homeowners' Association, the injury could be the same, yes, sir."[356]

Q. So, if the site that's across the way from Preston Highlands was selected because it was a good site for public housing and it didn't have anything to do with the fact that it's a predominantly white area, that wouldn't be a problem then?

A. I don't think there would be a remedy –

Q. Or a violation of your constitutional rights?

A. Yes, ma'am. No ma'am. I don't think it would be a violation of our constitutional rights for them to have selected that site at random."[357]

J. Expert qualifications, usefulness, and credibility

The purpose of expert testimony is to present the Court with scientific, technical or other specialized knowledge which will be useful to the Court in understanding the evidence or determining facts in issue. The person presenting the knowledge must be qualified. Since the expert is presented as an objective, scientific observer, that expert must be objective and truthful.[358] Three of the four Homeowners' experts failed to meet one or more of these standards. The testimony of the fourth expert, Mr. Couch, was entitled to little weight.

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[356] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition pages 56-57.

[357] Plaintiffs' 10/28/96 exhibit # 1 – Cherner deposition page 166.

[358] Fed. R. Evid. 702.

Professor Berry.

Professor Berry was retained to conduct an independent analysis of "whether the portion of Judge Buchmeyer's order requiring the construction of 674 public housing units in predominantly white areas is not narrowly tailored to serve the purpose of eradicating the vestiges of past discrimination because less intrusive means would suffice to achieve that same purpose."[359]

Professor Berry did little to qualify himself as an expert on public housing desegregation remedies. He has not written or published any articles examining the possible means of remedying de jure racial segregation in public housing programs.[360] He has never consulted on the evaluation of or formulation of a specific remedy for racial segregation in public housing programs.[361]

His only knowledge of the remedy in the East Texas public housing case against HUD came from the newspapers and what he learned at cocktail parties.[362] Even though he had been defendants' expert in the public housing desegregation cases in Omaha and Allegheny County, he never even read the remedial orders in those cases and had no knowledge of the role of public housing construction.[363]

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[359] Melsheimer to Berry June 26, 1996, page 2 attached to plaintiffs' 10/28/96 exhibit 34 Berry deposition.

[360] Plaintiffs' 10/28/96 exhibit # 34 – Berry deposition, page 14,

[361] Plaintiffs' 10/28/96 exhibit # 34 pages 13, 15-16, 18.

[362] Plaintiffs' 10/28/96 exhibit # 34 page 83.

[363] Plaintiffs' 10/28/96 exhibit # 34 page 47-50, 69-70.

The only step he took to determine what had been done in this case to use Section 8 as a means of providing desegregated housing opportunities was to read the Remedial Order Affecting DHA.[364] He was unaware of the basic demographics of the proposed location for the public housing.[365] In his deposition, Prof. Berry claimed that he did not know the racial composition of the proposed location and did not think the information was relevant.[366] He did not know the racial composition of the areas around DHA's existing projects or the racial distribution of the Section 8 program[367]

Professor Berry claimed that the only economists who would disagree with his conclusions would be Marxists.[368] Yet few of Professor Berry's opinions were supported by any of the authorities he cited. None of the articles supported his conclusions about social isolation, the market effects of vouchers and public housing, or the negative spillover effects of anti-social behavior caused by social isolation.[369]

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[364] Plaintiffs' 10/28/96 exhibit # 34 pages 57-58.

[365] Vol I pages 187-188.

[366] Plaintiffs' 10/28/96 exhibit 34 page 45. [Elsewhere in the deposition Prof Berry testified that the isolation of the tenants would be exacerbated because of the racial difference between the tenants and the neighbors [plaintiffs' 10/28/96 exhibit 34 pages 34-37, 40, 45-46].]

[367] Plaintiffs' 10/28/96 exhibit 34 pages 56-57.

[368] Plaintiffs' 10/28/96 exhibit # 34 page 75-76.

[369] Vol I pages 172-179, 181-186, 194-196; plaintiffs' 10/28/96 exhibit 29 – Lord & Rent study, page 299.

His claims for the benefits of scattered site projects with 6 or fewer units based on the Chicago experience were not supported by Sue Brady, the person in charge of the Chicago scattered site projects.

The size of the project makes little difference in neighborhood acceptance.[370] Whether a project is new construction or rehabilitation makes little difference in neighborhood acceptance.[371] The children of the project's neighbors are not the ones who discriminate against project children.[372] A fifty unit project is not more likely to cause prejudice against its residents than a project that fits into the neighborhood.[373] The more stable and middle class the neighborhood, the less problems at a project. The neighborhood stability is a factor, size of the project is not.[374]

The site residents who come from the neighborhood are more likely to engage in gang behavior than those who move from another neighborhood because the neighborhood residents are just moving around the block and they bring the problems with them. The outsiders are taken out of their historic setting and put in a new environment.[375] The gang activity that does exist does not come from the scattered site projects, the gangs form at

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[370] Plaintiffs' 10/28/96 exhibit 28 page 25.

[371] Plaintiffs' 10/28/96 exhibit 28 page 33.

[372] Plaintiffs' 10/28/96 exhibit 28 page 35.

[373] Plaintiffs' 10/28/96 exhibit 28 page 36.

[374] Plaintiffs' 10/28/96 exhibit 28 pages 40, 98-100.

[375] Plaintiffs' 10/28/96 exhibit 28 page 80.

the schools. The more stable the neighborhood, the less likely the presence of gang behavior.[376]

The clustering effect does not occur.[377]

Scattered site projects are preferential to Section 8 because of the ability to place the unit so it is truly integrated, it is more permanent than Section 8, and you do not need landlord acquiescence.[378]

The Homeowners' attorneys argued that Professor Berry's citation of articles that did not support his opinion was a sign of intellectual honesty.[379] Unfortunately Professor Berry claimed that the cited articles and other sources did support his opinion.[380] That claim was not credible.

Professor Berry's demeanor while testifying did not convey credibility. For example, he was asked why he did not use or cite academic articles on the issue of the effect of public housing on property values which articles contradicted his position and were cited in the Puryear study.[381] Professor Berry then claimed that he had decided not to cite articles which were published in the

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[376] Plaintiffs' 10/28/96 exhibit 28 pages 84-86.

[377] Plaintiffs' 10/28/96 exhibit 28 pages 81-82.

[378] Plaintiffs' 10/28/96 exhibit 28 pages 96-97.

[379] Vol I page 210.

[380] HO # 36B, HO # 36C.

[381] Plaintiffs' 10/28/96 exhibit 97.

1960s and 1970s.[382] The articles omitted included articles which were published in 1980s.[383]

Professor Berry criticized a survey report finding a high degree of tenant satisfaction with and little social isolation in scattered site projects in white areas of Charlotte, N.C.[384] One criticism was the lack of a random sample survey.[385] Professor Berry cited another survey report as supporting his conclusions.[386] When asked whether or not the second survey used random sampling, he answered yes, but he just could not remember the exact response rate.[387] There is no mention of either random sampling or response rates anywhere in the study.[388]

Professor Berry was neither credible, qualified, nor useful.

Professor Sa-Aadu.

Professor Sa-Aadu's opinions were limited solely to the relative economic efficiency of Section 8 and public housing.[389] He had never written on or studied this specific question.[390] His articles involved a comparison

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[382] Vol I page 201.

[383] Plaintiffs' 10/28/96 exhibit # 97 pages 26, 28, 92.

[384] HO # 36C.

[385] Vol I page 196.

[386] Vol I page 196.

[387] Vol I page 196-197.

[388] Plaintiffs' 10/28/96 exhibit # 96.

[389] Vol I page 99.

[390] Vol I page 111.

between Section 8 new construction and the Section 8 certificate program.[391] He had never studied whether the Section 8 program could be used to help desegregate a public housing program.[392]

Professor Sa-Aadu knew nothing about the cost of public housing development in the Dallas area.[393] He could not accept the notion that landlords would not rent to Section 8 tenants.[394] He knew nothing about any problems which black families might encounter in attempting to use Section 8 to find housing in white areas.[395] He knew of no studies based on the EHAP experiment which found that racial discrimination reduced the mobility of minorities.[396] He believed that minority EHAP families encountered only minimal and insignificant instances of discrimination.[397] He thought that the percent of minorities in DHA's Section 8 program who had been able to use vouchers to move into white areas had increased from 5% to 65%.[398]

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[391] Vol I pages 109-110. [Section 8 new construction is not an element of the remedial plan.]

[392] Vol i pages 115-117.

[393] Vol I page 111.

[394] Vol I page 108.

[395] Vol I page 117.

[396] Vol I page 120.

[397] Vol I page 118.

[398] Vol I page 117.

Professor Sa-Aadu saw no reason why DHA could not just take the HUD money provided for public housing and distribute it to tenants in the form of vouchers or cash grants.[399]

Professor Sa-Aadu's testimony was neither credible nor useful.

Professor Thibodeau.

Professor Thibodeau lied under oath at his deposition and on the stand.

Professor Thibodeau testified as follows at his deposition:[400]

> "A. The question I understand is: have I ever studied the effect of discrimination – housing discrimination on low-income households? The answer to that question is: I have not, but I'm familiar with some literature that has."[401]
>
> Q. Have you ever studied the effect of public or private housing discrimination on the housing available to any race or income level?
>
> A. No, I haven't."[402]

Referring to the experimental housing allowance program,

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[399] Vol I page 121, 123-124.

[400] Plaintiffs' 10/28/96 exhibit # 19.

[401] Page 22.

[402] Page 22.

"Q. Okay, do you know of any of the studies or reports or data that was collected from that experiment that considered race in any manner?

A. No, I do not.[403]

Q. In your career as an economist with significant involvement in public housing, has nobody ever suggested to you that it's more difficult for black families to participate effectively in the Section 8 program than it is for white families?

A. I have not spent much time looking at the racial issue.

Q. Did you understand me to ask you how much time you had spent?

A. The answer to your question is no."[404]

"Q. Has anybody ever suggested to you that it is more difficult for black families to use the Section 8 program than for white families?

A. I'm just thinking about the things that I've read. The things that I've read have more to do with discrimination in the housing market not discrimination vis-a-vis Section 8, so I'd have to answer no."[405]

Professor Thibodeau testified as follows on the stand:

"Q. Have you ever calculated the effect of public or private housing discrimination on housing available to any race or income level.

A. No, I have not."[406]

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[403] Page 64.

[404] Page 136.

[405] Pages 136-137.

[406] Vol II page 182.

Of course this testimony was false. Professor Thibodeau himself had authored a study calculating the effect of housing discrimination on housing available to minority housing allowance and Section 8 participants.[407] Other reports cited by Professor Thibodeau explicitly considered the effect of racial discrimination on Section 8 and housing allowance participants.[408]

This was a deliberate misrepresentation on a matter directly before the Court – the efficiency of Section 8 vouchers in providing desegregated housing opportunities to black families in white areas.

Professor Thibodeau also testified that all the articles cited in his report agreed with his conclusions.[409] The articles either did not support his conclusions or contained cautionary limitations that would severely limit the authority for and the scope of his conclusions.[410] This was not helpful to the Court nor was it proper behavior for an expert witness who has the obligation to be objective and forthright.[411]

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[407] Plaintiffs' 10/28/96 exhibit # 16; Vol I pages 183-189.

[408] Vol I pages 190-191, 199.

[409] Vol I pages 192-193.

[410] Vol I pages 192-201.

[411] Professor Thibodeau also fudged the numbers on his analysis of vacant units [Vol II pages 176-182 Thibodeau testimony; Vol III pages 134-150; plaintiffs' 10/28/96 exhibits 100-104, 106].

Mr. Couch.

Mr. Couch was allowed to testify as an expert even though the Homeowners' attorneys did not provide the adverse parties with a written report and did not disclose the underlying data until the day before Mr. Couch's testimony. The Court specifically noted that this would be taken into account when deciding the weight to be given his testimony.[412] The Court further directed the Homeowners to furnish plaintiffs' counsel with the underlying information so that Ms. Rhodes, plaintiffs' paralegal/investigator, could prepare Court exhibit # 2.[413] While verifying that data and preparing Court # 2, Ms. Rhodes discovered additional sales for the period covered by Mr. Couch's testimony.[414]

The lack of a report, the late disclosure, and the missing sales as well as Mr. Couch's inability to testify to a causal relationship between the announcement of the Sites and the drop in prices mitigate against giving Mr. Couch's testimony any weight.

K. Consistency of Homeowners' claims

As the Court has noted in a similar context, consistency is not a requirement for opposing a public housing desegregation remedy. *Walker III*, 734 F.Supp. 1311. These current opponents are no more consistent than others.

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[412] Vol II pages 28-30.

[413] Vol III pages 127-130.

[414] Plaintiffs' exhibit # 107 transmitted 11/15/96 with Rhodes' declaration.

The individual Homeowners assert that the problem with the public housing for their neighborhoods is not the people who will reside there but the structures and DHA's maintenance of those structures. Yet the Homeowners hired an expert to present a report and testimony which asserted, without support, that the people in the projects would engage in anti-social conduct which would spillover into the Homeowners' neighborhood and cause property values to drop. The expert testified that the fact that the public housing residents would be black would contribute to the problem and white public housing residents would not be as likely to engage in the anti-social conduct such as forming gangs.[415]

The individual Homeowners assert that the public housing residents would be welcomed with open arms into the single family residential area if they would only use Section 8.[416] The Homeowners know that the rent for those homes is not within the Fair Market Rent or 120% of Fair Market Rent which can be paid by Section 8.[417] The Homeowners know that the owner of the new multi-family complex immediately south of the Preston Highland Homeowner Association refuses to participate in the Section 8 program.[418]

The individual Homeowners assert that they have no desire to perpetuate the conditions of racial segregation

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[415] Plaintiffs' 10/28/96 exhibit # 34 pages 29-37, 40-41, 45-46.

[416] Vol I pages 51, 67 Jacob Cherner testimony.

[417] Vol I pages 79-80 Jacob Cherner testimony.

[418] Plaintiffs' 10/28/96 exhibit # 1 pages 156-158.

which the Court found to be unconstitutional. The individual Homeowners assert that their primary interest is the well being of the class members and that the least intrusive remedy, Section 8, is better for the class and the Homeowners. The Homeowners hired an expert who testified that the least intrusive remedy should, if necessary, develop any new public housing only in South Dallas where there are few expensive homes, the people are used to public housing, and property values are already low.[419]

L. Additional conclusions of law

The U.S. Supreme Court has expressly approved the use of race to locate publicly assisted housing units in predominantly white areas. *Hills v. Gautreaux*, 425 U.S. 284, 301 (1976).[420] *Gautreaux* also set out the general remedial principles for public housing desegregation cases. Once a constitutional violation is found, the court must tailor the scope of the remedy to fit the nature and extent of the constitutional violation. All reasonable methods must be available to formulate an effective remedy. The court should make every effort to employ those methods to achieve the greatest possible degree of relief, taking into account the practicalities of the situation. *Gautreaux*, 425 U.S. at 293-294, 297.

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[419] Vol II pages 166-175.

[420] "An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy." *Gautreaux*, 284 U.S. at 301.

The remedy must match the violation. For example, the lower courts found that the exclusion of women from the Virginia Military Institute violated the constitution. Those courts went on to approve a remedy which set up a separate system at another college. The U.S. Supreme Court reversed the remedy because it did not fit or match the violation.

The Supreme Court cited the general principle that the remedial measures must closely fit the constitutional violation. It must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of the discrimination. The state's remedy of a separate program did not match the violation which was the refusal to admit women into VMI. The state chose not to eliminate the discriminatory barrier but to leave it in place and offer the women a separate program. The Supreme Court held that approval of the remedy was constitutional error. *U.S. v. Virginia*, ___U.S. ___, 1996 U.S. LEXIS 4259; 64 U.S.L.W. 4638.

This Court may constitutionally employ racial classifications if those classifications are essential to remedy unlawful treatment of groups because of race. The need to remedy prior illegal race discrimination is a compelling government interest. A specific race conscious remedy must also be narrowly tailored. The factors which have been used to test for narrow tailoring include: efficacy of alternative remedies, the flexibility and duration of the relief including the availability of waivers, the relationship of any numerical goals to the relevant objective standard, and the impact of the relief on the rights of third parties. *U.S. v. Paradise*, 480 U.S. 149, 166, 171 (1987).

The U.S. Supreme Court has refused to adopt a least restrictive means of implementation standard as part of its narrow tailoring test. The choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. It is the district judge that has the first hand experience with the parties and the "flinty, intractable realities of day-to-day implementation of constitutional commands." There is no universal answer to the complex problems of desegregation. There is no one plan that will do the job in every case. *Id.* at 184.

There are no Fifth Circuit cases applying these principles to public housing desegregation cases.

The final remedy in *Gautreaux* was through a consent decree. The 7th Circuit upheld that decree which required the use of race in selection of sites for additional low-income assisted units. *Gautreaux v. Pierce,* 690 F.2d 616, 622-623, 634 n.21 (7th Cir. 1982). The underlying violations included racially segregative project site selection decisions. *Id.* at 619. The opinion does not discuss the issues before this Court.

The Philadelphia Housing Authority was ordered to construct a public housing project in a white neighborhood after neighborhood opposition had convinced the City, HUD and the Authority to stop the project. The Third Circuit found that the order to build the housing was an appropriate remedy for the violation, the refusal to build the housing. *Resident Advisory Board v. Rizzo,* 564 F.2d 126, 150 (3rd Cir. 1977).

Although not directly on point, there is a line of cases which holds that HUD has the obligation under 42 U.S.C.

3608 to consider the effect of its site approval decisions on the racial composition of the area and whether the decision will increase or maintain racial concentrations. *Shannon v. U.S.*, 436 F.2d 809, 820-821 (3rd Cir. 1970). Congress imposed a duty on HUD not to approve a housing project in an area of undue minority concentration and which would have the effect of perpetuating racial segregation. *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982). In order to avoid liability under 42 U.S.C. 3608, HUD must take into account the racial composition of the neighborhood within which a proposed project is located and decide whether use of the location will perpetuate housing segregation. *Anderson v. City of Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir. 1984).

HUD's site selection regulations require the consideration of race in its approval decisions. 24 CFR 941.202 "(c) The site for new construction projects must not be located in: (1) An area of minority concentration unless (i) sufficient comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot feasibly be met in that housing market . . . (2) a racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area."[421]

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[421] The regulation does not directly require public housing construction in white areas. It only presents a barrier to housing in minority areas. If the developer does not attempt to build in a white area and the minority sites are rejected, there is no violation of the regulation. This can result and has resulted in no new public housing.

HUD, the City of Dallas, and DHA violated the U.S. Constitution by starting, perpetuating and maintaining racial segregation in DHA's low-income housing programs. The violation included the use of race to choose black or minority neighborhood locations for the public housing projects. This choice was made in order to keep black people out of white neighborhoods. The implementation of the choice caused black families residing in public housing to live in racially segregated and unequal conditions.

The challenged remedy is directly related to the violation. The governmental defendants did not allow black occupied public housing to be located in predominantly white areas. The remedy is precisely tailored to this violation. Black occupied public housing shall be built in predominantly white areas. The construction of the public housing in minority or racially mixed areas would not fit the violation. *U.S. v. Virginia*, ___U.S. ___, 1996 U.S. LEXIS 4259; 64 U.S.L.W. 4638.

There are possible alternatives to the general use of public housing to provide the desegregative housing opportunities. The Section 8 program may be a potential way to create a comparable number of desegregative housing opportunities in predominantly white areas. In the first seven years of this case, it has not done so. The Section 8 program as administered under the previous remedial orders has been able to place less than 24% [1,255] of the total Section 8 units in 60% to 100% white census tracts [plaintiffs' 9/27/94 exhibit # 59]. There are substantial barriers to the successful use of Section 8 in a desegregation program. The appropriate sized units must

exist in predominantly white areas. The landlords managing those units must accept the program. HUD must provide a subsidy which allows rents sufficient to afford the units. DHA must competently operate the program. All of these barriers have existed during the remedial stage of this case. Nevertheless, the Court has urged the parties to come up with a plan that, allowing for the effects of these obstacles, will implement Section 8 as a general alternative to public housing.

Section 8 is not an alternative to the development of the 674 public housing units already allocated to DHA. The money for these units is here. The units must be placed somewhere. To forfeit the units rather than build them in white areas would continue the constitutional violation, not remedy the wrong. To build the units in minority concentrated or racially mixed areas would perpetuate the violation, not eradicate the vestiges of segregation.[422]

The relief is limited. The Remedial Order Affecting DHA requires a specific and limited number, 3,205, of units to be developed in predominantly white areas.[423] The actual relief provided may be even more limited. HUD has provided funding for only 647 additional public housing units.[424] HUD has indicated that it wants to exercise its option under the Remedial Order Affecting HUD and propose a plan to use Section 8 to substitute for

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[422] HUD might also engage in the rare exercise of its constitutional and statutory obligations and veto the minority or mixed sites. This would result in the units going unused.

[423] A. 3.

[424] Remedial Order Affecting DHA A. 2.

at least part of the future allocation of new public housing in predominantly white areas.[425]

The Remedial Order sets a goal of an additional 3,205 units in predominantly white areas. This goal, plus the few units already in predominantly white areas, is equal to the number of non-elderly public housing units in predominantly minority areas.[426] The population of the City of Dallas is now approximately 50% minority and 50% white. The equal number standard reflects this population mix. If race had not been a factor in the original placement of the public housing units, it would have been as likely to place a unit in a white area as in a black area.

The equal number is also consistent with the HUD policy which prohibits approval of units in minority areas unless there is a comparable number of units in white areas.[427] HUD's policy does not require equal numbers in every locality but rather describes a reasonable distribution of units which will approach an appropriate balance. While proportions other than 50-50 might be consistent with policy, 50-50 is within the range of a reasonable distribution which will approach an appropriate balance given the uncontested findings of discrimination in this case.

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[425] Memorandum In Support of Motion to Modify Remedial Order Affecting HUD, page 5.

[426] The number in predominantly minority areas after the demolition of the West Dallas units and assuming a West Dallas project with 950 units.

[427] Plaintiffs' 9/27/94 exhibit # 6. 24 CFR 941.202.

The development of the new units in minority and low-income concentrated areas would violate national policy and City of Dallas policies favoring the deconcentration of assisted units.[428] Correspondingly, placing the units in predominantly white areas will further the national and local policies. Placing the next set of public housing units in predominantly white areas also avoids a conflict with the national and local policies favoring deconcentration of low-income assisted units.

There are several sets of third parties potentially affected by the issue of the race conscious site selection requirement. If there are disadvantages to homeowners, then any site selection standard will result in some homeowners being impacted by those units and some homeowners avoiding the impacts. There will also be impacts on non-class members who are on or who might be on DHA's waiting lists. The choices of these white and Hispanic public housing eligible households will also be affected by the site selection standards.

As set out above, any impact on the homeowners near the Sites will be comparatively minimal and diffuse. Eighty units in the census tract will not noticeably affect any demographic characteristic of the area. The use of race to locate public housing units in predominantly

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[428] Plaintiffs' 9/27/94 exhibits ## 6-9 HUD documents on deconcentration; ## 18-19 City of Dallas Housing Assistance Plan and modifications providing that public housing replacement units should be developed only in non-concentrated areas and setting City policy requiring deconcentration of assisted housing.

black areas has significantly affected the demographic characteristics of those census tracts.

The general use of the predominantly white criteria will avoid further disadvantages to the homeowners in the existing public housing neighborhoods. The homeowner input and small project policies being followed by DHA in the development of the units in white areas were not used when the existing projects were built in black areas. These homeowners got 3,500, 600, or 500 units of public housing in their neighborhoods. There is no record of any input from these homeowners in the design, operation, or maintenance of those large projects.

The present locations of DHA's public housing projects may also deter low-income whites and Hispanics from even applying for public housing. Low-income whites have always had more choices for low-income housing than have blacks. *Walker v. HUD*, 734 F.Supp. 1289, 1293 n. 16, 1296, 1302. Public housing located in predominantly white areas at least has the potential of attracting white and Hispanic tenants.[429] Without these tenants, the projects will remain predominantly black.

Conclusion

This Court has been dealing with the flinty, intractable realities of remedy in this case for almost 10 years. The remedial requirement that the existing allocation of new public housing be developed in predominantly white areas serves the compelling governmental purpose

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[429] Plaintiffs' 12/12/88 exhibit # 30 – Desegregation study pages 4-3 to 4-4.

of remedying past racial discrimination. The remedy is an exact fit to the violation, the refusal to develop public housing in white areas. Unless the housing is developed in white areas, the violation and its effects will continue.

This Court, probably more than any other court in the country, is aware of the promises and problems of the Section 8 program in a desegregation remedy. The Court has requested a plan that will allow Section 8 to furnish most of the desegregated housing opportunities instead of public housing. Even with such a Section 8 plan, the Court must take the existing allocation of funding for new units into account in its remedial ruling. If the units are not developed or are developed in non-white areas, the constitutional violation will continue. The only choice, consistent with constitutional principles, is to develop the units in white areas.

ENTERED: OCTOBER 6, 1997

/s/ Jerry Buchmeyer
JERRY BUCHMEYER,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	CIVIL ACTION NO.
v.	*	3:85-CV-1210-R
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	*	CLASS ACTION Consolidated with 3:96-CV-1866-R

JUDGMENT

(Filed Sept. 18, 1997)

The Walker plaintiffs are the remaining named plaintiffs and the plaintiff class of African-American participants in the Housing Authority of the City of Dallas's [DHA] low income housing programs. The Walker plaintiffs seek declaratory relief that the race conscious public housing site selection, tenant selection and assignment, and Section 8 mobility provisions of the Remedial Order Affecting DHA are constitutional. The Walker plaintiffs seek this relief in 3:85-C-1210-R against defendants who are the Homeowner plaintiffs in 3:96-CV-1866-R. The two cases were consolidated.

The Homeowner plaintiffs in 3:96-CV-1866-R are Highlands of McKamy IV and V Community Improvement Association, Preston Highlands Homeowners' Association, Inc., Ginger Lee, and David Beer. The Homeowner plaintiffs Complaint sought a temporary restraining order, preliminary and permanent injunctive relief and a declaratory judgment against DHA's development of public housing in their predominantly white

area.[1] The Homeowner plaintiffs in 3:96-CV-1866-R allege that DHA's compliance with the remedial Order Affecting DHA by choosing public housing sites in white areas is unconstitutional. DHA opposed the relief sought in 3:96-CV-1866-R.

The Homeowner plaintiffs' request for injunctive relief in 3:96-CV-1866-R and the Walker plaintiffs' Supplemental Complaint Seeking Declaratory and Other Relief in 3:85-CV-1210-R were set for a consolidated trial on October 28, 1996. The trial was before the Court without a jury.

Judgment for the Walker plaintiffs in 3:85-CV-1210-R is granted. The race conscious public housing site selection, tenant selection and assignment, and Section 8 mobility provisions of the Remedial Order Affecting DHA are constitutional.

Judgment for DHA in 3:96-CV-1866-R is granted. The Homeowner plaintiffs' requests for injunctive and declaratory relief are denied.

Costs for taxable expenses are allowed in favor of the Walker plaintiffs in 3:85-CV-1210-R. Costs for taxable expenses are allowed in favor of DHA in 3:96-CV-1866-R. Any motions for attorneys' fees and related nontaxable expenses may be filed and served as late as 30 days after the final conclusion of any appeals of this judgment.

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[1] The request for a TRO was denied. No motion for a preliminary injunction was ever filed.

This Judgment is based on the findings of fact and conclusions of law stated orally and recorded in open court on August 25, 1997. A copy of the transcript of these findings and conclusions are attached to this judgment. Written findings and conclusions will also be entered by the Court.

17 Sept 97
DATE

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
CHIEF JUDGE
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-11083

DEBRA WALKER, Et Al

Plaintiffs

DEBRA WALKER; JEANETTE WASHINGTON; HAZEL WILLIAMS; ZELMA LANG; RENITA BROWN; LILLIE THOMPSON;

Plaintiffs - Appellees

TRACEY SMITH

Intervenor Plaintiff - Appellee

v.

MESQUITE TX, CITY OF, Et Al

Defendants

DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

Defendant - Appellee

HIGHLANDS OF MCKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INCORPORATED; DAVID BEER

Plaintiffs - Appellants

v.

THE HOUSING AUTHORITY OF THE CITY OF DALLAS

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

(Filed May 19, 1999)

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion 3/16/99, 5 Cir., ___, ___ F.3d ___)

Before JONES, SMITH, Circuit Judges, and SHAW*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en

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* District Judge of the Western District of Louisiana, sitting by designation.

banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	
	*	CIVIL ACTION NO.
v.	*	
	*	3:85-CV-1210-R
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	*	CLASS ACTION
	*	(Filed Feb. 7, 1995)
	*	
and	*	
	*	
U.S. DEPARTMENT OF JUSTICE.	*	

REMEDIAL ORDER AFFECTING DHA

Vestige A. 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[1] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79].

DHA is ordered to take the following actions to eliminate this vestige:

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[1] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68 – excerpt from DHA monthly report].

A.1. demolish at least 2,630 units of the public housing in the West Dallas project.

A.2. provide one-for-one replacement units for each unit to be demolished before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. The additional 698 Section 8 vouchers promised in the HUD plan submitted to the Court are one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.3. Develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas. These units shall be in place and occupied before any non-family units or any units in non-predominantly white areas are developed. The restriction set out in the immediately preceding sentence does not apply to the use of public housing units in the reconfiguration of the West Dallas projects provided for in ¶ B.7. of this order. The site for each unit must be approved by the Court and the units, projects, and neighborhoods for the units must provide housing opportunities substantially equivalent to the units, projects, and

neighborhoods in and around the predominantly white located HUD assisted projects in Dallas County. The units may not be located in areas where the poverty rate exceeds 13%, the county average. The development of these units is dependent upon the provision of funding for public housing or comparable programs by HUD to DHA.

A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the center of the proposed location of the project. If the population, using the block level data for the most current US Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area. The relevant area for the determination of the poverty rate shall be the US Census census tract block group in which the site is located.

The already allocated 674 units of new public housing units shall be occupied within 3 years of the date of this order or, if allocated for suburban development within 3 years and 6 months of the date of this order, unless an extension is granted by the Court for good cause.

A.4. DHA shall make an application for public housing assistance at each available opportunity. All units allocated by HUD in the future shall be occupied within 3 years of the date of the allocation unless an extension is granted by the Court for good cause.

A.5. 350 of the currently available new public housing units and 50% of all subsequent allocations shall be tentatively reserved for use in predominantly white areas of the Dallas suburbs. DHA shall request that the suburbs enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb. If there are not enough suburban cooperation agreements signed or suburban sites available for acquisition within 6 months of the date of this order, then DHA shall develop the units in predominantly white areas of the City of Dallas. The three years for the initial occupancy of these units will begin to run after the expiration of 6 months from the date of the order.

A.6. DHA shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.

A.7. Given the applicants' and residents' stated preference for Section 8 units, DHA is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at least part of the future allocations of new public housing in

predominantly white areas. In order to be approved by the Court such a plan must:

a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and

b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.8. DHA may use a race conscious tenant selection method for the purposes of preventing or reducing racial identifiability if every person skipped over because of race is provided an equivalent [in terms of cost to the tenant, convenience and suitability for the family's individualized needs and location preferences] alternative housing opportunity. Before use, the method shall be submitted to the Court for approval. The race conscious tenant selection and assignment method should be used only in those instances where the desegregative benefit is substantial enough to justify the use of the resources for the alternative housing opportunities needed to achieve the benefit.

A.9. DHA may use a tenant selection and assignment method which maximizes applicant choice to the extent the exercise of such choice does not unavoidably cause or

maintain racially identifiable projects. For example, if there are 10 units in predominantly black projects available and the top ten applicants on the list are black, then the exercise of choice will not unavoidably cause or maintain racially identifiable projects. If there are 7 units in predominantly black projects and three units in a non-racially identifiable project and the top ten applicants 7 blacks and 3 whites, then the exercise of choice could cause or maintain racially identifiable projects depending on the preferences of the individual applicants.

A.10. Until another method is approved by the Court, DHA shall make the applicant with the oldest application date one offer which if refused results in placement at the bottom of the waiting list. If any appropriate units vacant at the time of the offer is located in an area or project where the applicant's race does not predominate, those units shall be offered to the applicant. Any offer to the West Dallas project may be refused by an African-American applicant and that applicant shall not lose her place on the waiting list. Any offer of a unit in a predominantly white project or location may be refused by a white applicant and that applicant shall not lose her place on the waiting list.

A.11. DHA shall ensure that each African-American household accepting a non-elderly, handicapped, or disabled designated public housing shall be placed on the Section 8 waiting list with an application date of the acceptance of the public housing. If the person accepting public housing is already on the Section 8 waiting list, then the application date is the actual application date. Each African American household in a non-elderly, handicapped, or disabled designated public housing unit who

is also on the Section 8 waiting list shall have a desegregated housing opportunity preference equal to a federal preference.

A.12. A racially identifiable minority public housing project has 75% or more non-Hispanic black, Hispanic, or other minority total population. A racially identifiable white public housing project has 75% or more non-Hispanic white total population.

A.13. Propose and implement a plan, as approved by the Court, providing magnet project improvements for any family project located in minority racially concentrated areas for which there is not a substantial decline in racial identifiability within the three years after the unit, project, and neighborhood improvements required below are completed.

> **Vestige B.** The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62 – 66, 68 – 80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

DHA is ordered to take the following actions to eliminate this vestige:

B.1. Prepare and submit for court approval a schedule for achieving the unit and project improvements necessary to make the unit and project conditions at DHA's projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas and including the

improvements listed in paragraphs 32 – 35 on pages 23 – 25 and 38 – 46 on pages 26 – 27 of the DHA proposed permanent injunction for each DHA project. The schedule should be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the possible sources of funding for each improvement. Priority should be given to achieving the improvements in security necessary to achieve a safe environment within each project. The projects with the highest crime rate should be given priority in the funding for the prevention of crime.

B.2. The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Future funding may become available through other programs from local or federal agencies. DHA shall make application for all funding which could be used to address the inequalities affecting its public housing program. DHA's ability to achieve the improvements in B.2. is limited by the resources available, the need to maintain all of its units in decent, safe, and sanitary condition, and to comply with the statutory and regulatory requirements of DHA's low income housing programs.

B.3. HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.108(d). This order requiring a remedy for the constitutional and statutory violations of racial segregation is just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provision of the operating subsidy for the vacant West Dallas

units. DHA shall take the remedial needs imposed by this order into account when submitting its request for its operating subsidy from HUD. If the subsidy provided, in combination with other funding actually available to DHA, does not allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4. The neighborhood conditions around DHA's projects which must be addressed in order to achieve substantial equality with the conditions in and around the HUD assisted projects in predominantly white areas include those listed in B.5. below.

B.5. The conditions adversely affecting all or some of DHA's projects include:

a. high rates of crime,

b. exposure to industrial uses and environmental hazards,

c. inappropriate industrial zoning,

d. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

e. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

f. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

g. high concentrations of poverty households and households on public assistance, and

h. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.6. DHA's ability to affect these neighborhood conditions around the existing projects is limited to the operation of its own projects and to requesting actions by local and federal agencies and the private sector. DHA's plan for improvement of the neighborhood conditions shall include the determination of which agencies and institutions can improve the conditions and a request to those agencies and institutions for the actions which will improve the conditions.

B.7. In addition to the improvements listed for each DHA project, DHA shall implement a reconfiguration of and improvements to the West Dallas project units consistent with the concepts in the Lakewest Master Plan submitted to the Court under the following conditions:

a. no more than 950 units of public housing may remain in place after the configuration and improvements and this number shall be reduced by the number of City Consent Decree ¶ 3.5 units provided as part of the reconfiguration,

b. prior to the use of any new public housing units in the reconfiguration of the West Dallas project, DHA and plaintiffs shall seek the cooperation of the City of Dallas in provision of up to 200 necessary infill units under ¶ 3.5 of the City Consent Decree in this case.

c. In the event that City Consent Decree ¶ 3.5 units are not available in time to be used in the reconfiguration of the first village no more than a total of 50 new public

housing units may be used in the reconfiguration and improvements of that village,

d. In the event that no City Consent Decree ¶ 3.5 units become available for use in the reconfiguration of the West Dallas projects, no more than a total of 200 units of new public housing may be used in that reconfiguration. The use of these units shall not result in more than 950 public housing units remaining in place after the reconfiguration.

e. Plaintiffs are arguing for a provision in the order that would prohibit any reconfiguration or improvements to the West Dallas site "until the status of the RSR/Murmur site on the National Priorities List and any remedial efforts have been fully resolved." DHA opposes this language because "there is no evidence of any significant environmental health hazard to residents of DHA's West Dallas developments arising out of lead contamination connected with the RSR/Murmur site" and thus there should be no reason to delay the construction of improvements in West Dallas [DHA's Response to Plaintiffs' Motion for Entry of Remedial order Affecting DHA, page 1]. This paragraph is the only paragraph in this order that has not been consented to by DHA [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. Therefore, the resolution of this issue will be set for a future hearing and resolution by the Court.

f. any construction, rehabilitation, excavation or other construction work will be done in compliance with all necessary safeguards against releases of hazardous substances,

g. DHA has requested a change in zoning to provide an adequate "buffer zone" between the industrial zoning and uses on Singleton Blvd. and the areas of the West Dallas project to be used for residential purposes.

h. the tenant selection and assignment plan shall provide that no applicant shall lose her or his place on the waiting list because a unit in the West Dallas project has been rejected,

i. the specific reconfiguration and improvements have been approved by the Court.

B.8. DHA shall submit a plan for achieving and maintaining substantial equality of conditions in DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

> **Vestige C.** At least 2,850 [59.2%) of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

C.1. DHA's September, 1994 survey showed that at least 23% of those on the waiting list preferred housing in the suburbs, 27% preferred housing in North Dallas, and 11% preferred housing parts of Dallas "Other" than those listed [plaintiffs' 9/27/94 exhibit # 91].

C.2. DHA shall provide the mobility services to African-American applicants for DHA's low income housing programs and class members necessary to achieve and maintain a percentage of DHA's Section 8 allocation in predominantly white areas of the Dallas suburbs and a

percentage of DHA's Section 8 allocation, including those in the suburbs, in predominantly white areas of North Dallas, predominantly white other parts of Dallas County, and predominantly white adjoining areas. The percentages shall be set after completion of another survey of the area preferences of DHA's applicants and participants. DHA and plaintiffs shall attempt to agree on the contractor for the survey and the content and procedure of the survey. In the event such agreement cannot be reached, the Court will determine any issues upon which there is no agreement.

The results of the survey shall be considered by DHA and the plaintiffs in their proposals for the target percentages for the mobility program. If agreement cannot be reached, the Court will set the target percentages. These percentages shall be achieved within four years of the date of the order setting the targets and maintained thereafter.

C.3. The mobility services provided shall include landlord recruitment, FMR and voucher payment levels, child care and transportation services, and Title VIII enforcement actions. The mobility services provided by DHA shall include the provision of neighborhood specific information on crime rates, objective indicators of school quality such TAAS results for the schools in the area, social services, job training and employment opportunities, day care, medical facilities, neighborhood shopping services, transportation, and environmental hazards or other conditions inimical to family life.

C.4. DHA's ability to provide the mobility services and achieve the target percentages depends on the

availability of funding for the provision of those services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, and the choices of the program participants. The need to avoid concentrations of assisted persons in individual locations shall also be taken into account in determining DHA's performance in achieving the target percentages.

C.5. DHA shall conduct quality control review inspections of at least 10% of all Section 8 EHP units within 90 days after the initial or annual Housing Quality Standards inspection and comply with all HUD HQS requirements.

> **Vestige D.** The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs' 9/27/94 exhibits ## 70 – 73, 76, 78].

D.1. DHA shall conduct perimeter inspections of all Section 8 EHP units at least twice annually, noting all obvious code violations on surrounding properties and reporting those violations to appropriate city code officials.

D.2. DHA shall monitor criminal activity, including criminal drug related activity, at and around all apartment projects in which 10 or more DHA Section 8 participants reside. A level of criminal activity at rates higher than the overall City of Dallas rates for any category of crime which level exists for more than six months shall be

grounds for refusing to approve any additional Section 8 contracts at that project and for relocating those Section 8 participants in residence.

E. Monitoring and reporting

E.1. DHA shall file quarterly reports detailing the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall be filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. DHA shall give Plaintiffs' counsel access upon request and upon reasonable terms to information and documents relevant to compliance with the decree.

F. Jurisdiction of the Court

F.I. The Court retains jurisdiction to enforce and modify this injunction according to general equitable principles.

F.2. Should DHA choose to assert that unitary status has been achieved, then DHA shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which the party relies for the assertion that no further action to remove the vestiges of racial segregation is practical or

required, whether or not actions by an organization, entity, or person other than DHA could further desegregation, what such actions are and the steps taken by DHA to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.3. Unitary status means that the all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

7 FEB 95
Date

/s/ Jerry Buchmeyer
United States
District Judge

Supreme Court, U.S.
FILED
OCT 18 1999

No. 99-296

In the Supreme Court of the United States

DEBRA WALKER, ET AL., PETITIONERS

v.

CITY OF MESQUITE, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the remedial order in this case, requiring that public housing units be developed in predominantly non-minority residential areas, is narrowly tailored to remedy the unconstitutional exclusion of public housing from those areas.

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In the Supreme Court of the United States

No. 99-296

DEBRA WALKER, ET AL., PETITIONERS

v.

CITY OF MESQUITE, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 169 F.3d 973. The opinions of the district court (Pet. App. 36-65, 66-206) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1999. A petition for rehearing was denied on May 19, 1999 (Pet. App. 210-212). The petition for a writ of certiorari was filed on August 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The decision below resulted from an appeal from two orders entered in consolidated actions. The first is a final judgment in an action brought by respondents,

Highlands of McKamy IV & V Community Improvement Association v. *Dallas Housing Authority*.[1] The second is a declaratory judgment in an action initiated by petitioners, *Walker* v. *City of Mesquite* (hereinafter the *Walker* litigation).

1. a. *Walker* is a long-standing class action housing discrimination case in which the district court held the Housing Authority of the City of Dallas (DHA), the City of Dallas, and the Department of Housing and Urban Development (HUD) liable for unconstitutional racial discrimination and segregation in low-income housing programs in the City of Dallas and its suburbs. See *Walker* v. *HUD*, 734 F. Supp. 1289 (N.D. Tex. 1989) (*Walker III*).

From its creation in 1938, DHA operated a *de jure* segregated public housing program, with the express purpose of maintaining racial and ethnic residential segregation. In accordance with its discriminatory policies, DHA developed separate housing projects for whites, Hispanics, and African Americans, and excluded most public housing projects for families from white neighborhoods. *Walker III*, 734 F. Supp. at 1293-1297; Pet. App. 72-83.[2] The district court found that "[f]rom its beginning, the primary purpose of DHA's public housing program was to prevent blacks from moving into white areas of this city." *Walker III*, 734 F. Supp. at 1293. As the court of appeals wrote:

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[1] Although the Department of Housing and Urban Development is also a respondent in this case, we refer to the plaintiffs in the *Highlands* action as "respondents."

[2] Public housing refers to low-income housing constructed and maintained with loans and annual contribution contracts from HUD (or its predecessor agencies). Public housing projects generally are developed and owned by a local public housing authority, such as DHA. See 42 U.S.C. 1437b-1437d.

> The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation. * * * Virtually all non-elderly public housing units were constructed in minority areas of Dallas. No new public housing units were built between 1955 and 1989 at least in part for fear that they might be located in white areas. Tenant selection and assignment procedures for public housing units were crafted and administered to maintain racially segregated projects.

Pet. App. 4-5 (footnotes omitted). In 1994, over 95% (6,133 of 6,411) of DHA's public housing units for families, and over 92% (2,876 of 3,116) of the black families residing in public housing operated by DHA were located in predominantly black or minority areas in which the poverty rate exceeded 40%. Pet. App. 86; see *id.* at 4 n.4. The largest of DHA's public housing projects was the West Dallas Project. Built in the early 1950's to solve the "Negro housing problem," West Dallas, with 3,500 units, was one of the largest concentrations of public housing in the country. *Id.* at 5 n.5, 74-78.

In addition to discrimination in its public housing program, DHA operated its Section 8 certificate and voucher programs to discourage African Americans from moving into white areas of metropolitan Dallas. Pet. App. 5, 84-85.[3] In 1994, only 21% of black Section 8 households lived in predominantly white neighbor-

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[3] Under the Section 8 certificate and voucher programs, qualified low-income individuals and families rent housing units from private owners, and have their rents subsidized, generally through the local public housing authority, with funds provided by HUD. See 42 U.S.C. 1437f(*o*).

hoods, compared with 45% of white Section 8 households. *Id.* at 224.

b. In 1987, the district court approved a consent decree settling the *Walker* litigation. Pet. App. 3-4. The 1987 consent decree required the demolition of approximately 2,600 units of public housing at West Dallas, and the one-for-one replacement of those units with new public housing and Section 8 certificates and vouchers. *Id.* at 5. DHA was required to build 100 units of public housing in predominantly white areas and to create a Housing Mobility Division to assist black and other minority families to use Section 8 vouchers and certificates to move to non-minority areas of Dallas and the suburbs. *Id.* at 6; see *Walker III*, 734 F. Supp. at 1255. After DHA failed to comply with its obligations under the consent decree, and other intervening events, see *Walker* v. *HUD*, 912 F.2d 819 (5th Cir. 1990), the district court vacated the consent decree in 1992. Pet. App. 7.

The district court then entered remedial orders against DHA in 1995 (Pet. App. 213-228) and against HUD in 1996 (C.A. R.E. Tab 6).[4] As a remedy for the

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[4] HUD appealed from the entry of the 1996 Remedial Order Affecting HUD on both liability and remedy grounds, but withdrew that appeal after reaching a settlement agreement with the *Walker* plaintiffs. The Modified Remedial Order Affecting HUD (Supp. C.A. R.E. Tab 2) was entered by the district court on December 5, 1997. The Modified Remedial Order retains HUD's core obligations, along with a number of other HUD remedial obligations, but also places express limits on the court's authority to impose any additional burdens upon HUD beyond those set forth in the order's terms. In particular, the Modified Order states that while the court may require HUD in specified circumstances to provide "comparable relief" in lieu of the relief the modified decree requires by its terms, "[s]uch comparable relief shall not, however, require the Federal Defendants to provide or expend

continuing concentration of public housing in predominantly black or minority concentrated areas (Pet. App. 213), the DHA remedial order calls for the demolition of at least 2,630 public housing units at West Dallas and the development of 2,807 replacement housing units, consisting of 774 public housing units and 2,033 Section 8 certificates and vouchers. *Id.* at 214. In addition, DHA is required to provide 3,205 additional housing units in predominantly white areas. *Id.* at 214-215. As contemplated by the remedial orders (*id.* at 216- 217), HUD intends to provide funding for all of the 3,205 additional units through the Section 8 program. *Id.* at 9 n.10. The DHA remedy order provides that, except for units used in the reconfiguration of the West Dallas project, no public housing may be built in a non-predominantly white area until the 3,205 units are provided in predominantly white areas. *Id.* at 214.

As a remedy for the continued concentration of black Section 8 users in predominantly black or racially concentrated or low income areas, the DHA remedial order requires DHA to provide mobility services to African American applicants and residents to assist them in using Section 8 certificates and vouchers in predominantly white areas of Dallas and its suburbs. Pet. App. 224-225.

Substantial parts of the remedy have already been implemented. The demolition of the requisite units at West Dallas has been accomplished. Of the 774 units of public housing, 200 units have been designated for use in the reconfiguration of West Dallas, 100 units have

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funds in an amount greater than that expressly agreed to by the Federal Defendants under the terms of this Remedial Order." Supp. C.A. R.E. Tab 2, at 21; see also *id.* at 19 ("The Court may not increase the financial burden of HUD.").

been constructed, and 75 units are under development in predominantly white neighborhoods.[5] But even after the demolition at West Dallas and the completion of the first 100 units of public housing in a predominantly white area, there were still approximately 3,500 units of public housing in predominantly minority areas and only 353 units in predominantly white areas. Pet. App. 7-9 & nn.8-12.

2. Respondents' action, filed in 1996, concerns two properties that DHA proposed to acquire for the purpose of constructing two 40-unit public housing projects in predominantly white areas pursuant to its obligations under the DHA Remedial Order in *Walker*. Respondents, whose homes are in the vicinity of the two sites, contended that DHA's selection of the sites violated their rights under the Fourteenth Amendment and sought a temporary restraining order and permanent injunction to prevent DHA from acquiring or constructing public housing on the sites. C.A. R.E. Tab 8, at 6-7, 13-15. Respondents expressly declined to challenge the district court's findings of intentional discrimination by DHA. C.A. R.E. Tab 8, at 10. Nor did they challenge the suitability of the two sites for public housing. See Pet. App. 47-49, 69-71. Rather, they alleged that the portion of the *Walker* remedy that requires DHA to develop public housing in predominantly white areas is unconstitutional because it is race-conscious and is "neither the most effective and flexible way in which to remedy past discrimination, nor is it the least intrusive remedy with respect to the impact that the remedy will have on the rights of

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[5] HUD recently submitted its proposed plan for the additional 3,205 units, but the district court has not yet acted to approve or disapprove that plan.

innocent third parties such as Plaintiffs." C.A. R.E. Tab 8, at 10.

3. Respondents' action was consolidated with the *Walker* litigation, and petitioners filed a supplemental complaint seeking a declaratory judgment that the DHA Remedial Order is constitutional and an injunction against efforts to obstruct its implementation. C.A. R.E. Tab 9. After an evidentiary hearing, the district court approved the sites, granted petitioners' request for declaratory relief, and denied relief to respondents.

The district court found that respondents had failed to prove that there would be any decline in property values in their neighborhoods as a result of the construction of public housing on the two sites, Pet. App. 122-133, and that any other adverse effects of the construction of public housing on the two sites would be limited and diffuse, *id.* at 117-121. The district court found that, although DHA had neglected its public housing properties in the past, *id.* at 124, the present DHA administration had "not generally failed to competently develop, maintain, or manage its units," *id.* at 122. Moreover, the court found, the DHA remedial order contained provisions that would prevent such neglect of the new public housing by either DHA or by the City of Dallas, and DHA was taking steps to minimize the impact of the new public housing on surrounding properties. *Id.* at 119-124.

The district court also found that the use of Section 8 certificates and vouchers would not fully remedy the public housing violation. Pet. App. 134-168. In particular, the court found that many landlords in predominantly white areas refused to accept vouchers or certificates, that there was a shortage of three and four-bedroom units, a shortage of units at rents permitted

under the Section 8 program, and other barriers to use of Section 8 in predominantly white areas, such as high security deposits and stringent employment requirements. *Id.* at 140-141, 144-147. The district court found that 80% of DHA's Section 8 tenants were unable to find housing in predominantly white areas, despite DHA's mobility counseling and outreach to landlords. *Id.* at 147.

4. Respondents appealed, and the court of appeals granted their motion for a stay of construction on the sites pending appeal. On the merits, the court of appeals reversed the declaratory judgment granted to the *Walker* plaintiffs, vacated the DHA remedial order, remanded for further proceedings, and continued the stay pending entry of a revised remedial order.

a. The court of appeals first ruled that respondents had standing to challenge the selection of sites in their neighborhoods. Pet. App. 11-15. It held that the use of a racial classification to select the sites was itself an injury sufficient to give respondents standing. *Id.* at 14. The court of appeals also concluded that, in light of "the potential for neighborhood disruption traceable to improperly managed public housing projects," respondents' assertion that their quality of life and property values would be diminished gave them standing to challenge the selection of the sites. *Id.* at 15.

b. The court of appeals also concluded that respondents had alleged an equal protection violation. Pet. App. 16-18. The requirement that public housing sites be selected in predominantly white neighborhoods, the court of appeals held, was an explicit racial classification, and thus subject to strict scrutiny. Because respondents did not challenge the existence of a compelling governmental interest, the court of appeals went directly to the narrow tailoring phase of strict scrutiny,

applying the five factors set forth in *United States* v. *Paradise*, 480 U.S. 149 (1987): "(1) the necessity for relief, (2) the efficacy of alternative remedies, (3) the flexibility and duration of relief, (4) the relationship of the numerical goals to the relevant market, and (5) the impact of the relief on the rights of third parties." Pet. App. 19. The court concluded that "[u]nder the balance of the *Paradise* factors, the [racial site selection] criterion is not narrowly tailored." *Id.* at 34.

In what turned out to be the dispositive portion of its analysis, the court of appeals held that the first two *Paradise* factors "weigh against race-conscious site selection" because alternative, race-neutral remedies were available. Pet. App. 22. The court of appeals rested that conclusion on its perception that the use of Section 8 certificates and vouchers had "not been given a fair try to prove their potential to desegregate" and that "other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing." *Ibid.* The court of appeals referred to statistics showing that, as DHA's Section 8 mobility program under its remedial order was getting underway between 1994 and 1996, there was a significant increase in "the number of Section 8 black families living in predominantly white areas." *Id.* at 25. The court stated that, "[b]ased on the relative success of DHA in moving blacks into predominantly white areas via its Section 8 program between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination." *Ibid.* The court of appeals stated that, with "increased funding for both more vouchers and the mobility program, more mobility counselors, and higher fair market exception

rents," *id.* at 26-27 (footnotes omitted), the Section 8 program—which it viewed as a "race-neutral remedial measure," *id.* at 26—could be even more successful at providing desegregated housing opportunities. The court also found that an explicit racial classification for the selection of sites was unnecessary because the selection of sites based upon geographic location or the poverty rate of persons living in the area could also achieve a desegregative result. *Id.* at 22, 27-28. The court of appeals also reasoned that, since the vast majority (up to approximately 92%) of the housing to be provided under the remedial orders would be Section 8 certificates and vouchers, it was "baffling to assume" that Section 8 vouchers could not satisfy "the district court's remedial goal" for the balance of the remedial housing. *Id.* at 31-32.

The court of appeals held that the third *Paradise* factor—"the flexibility and duration of relief" was "neutral in this case." Pet. App. 32 n.37. But the court held that "the relationship of the numerical goals to the relevant market"—the fourth *Paradise* factor—was not justified. *Id.* at 32-33. The district court had based the goal of placing half the families in DHA's programs in predominantly white areas on the ground that Dallas's population is approximately half white and half minority. The court of appeals faulted this rationale as overly broad, since the suit was brought on behalf of a class of black—not Hispanic—plaintiffs. The court of appeals found that the remedial order's definition of a "predominantly white" area—63% non-Hispanic white—was similarly flawed, since it was "based on the idea that public housing may not be placed in neighborhoods with higher concentrations of Hispanics." *Id.* at 32. The remedial goal, the court of appeals concluded, "should instead be directed toward placing public

housing participants in neighborhoods of their choice through a vigorous Section 8 program, non-black neighborhoods, census tracts in which no public housing currently exists, or non-poor neighborhoods." *Id.* at 32-33.

Finally, the court discussed the fifth *Paradise* factor —the impact on third parties—but appeared not to reach a clear holding regarding its application here. The court noted the various ways in which the district court had attempted to minimize the impact on third parties such as respondents. The court acknowledged that the district court had "ordered stringent criteria for the design and upkeep of the projects and for tenant selection," and that it had also provided for "the participation of neighboring community members, like [respondents], in planning the projects." Pet. App. 33. But, the court of appeals stated that, in "attempt[ing] to placate [respondents'] fears of deterioration in their neighborhoods," the remedial order "lends credibility to those fears." *Id.* at 34.

c. Having found that "[a]s applied to the facts of this case, the district court erred in employing a race-conscious remedy before utilizing race-neutral alternatives," Pet. App. 34-35, and that "it is premature to utilize such a last-resort measure," *id.* at 34, the court of appeals remanded to the district court "for further consideration," *ibid.*

ARGUMENT

Although in our view the decision of the court of appeals was mistaken, the court's opinion appears to rest in large part on a misapprehension of the facts of this case. Because the court's decision was made in an interlocutory setting, does not squarely conflict with a decision of any other court of appeals, and is to a great

extent fact-bound, review by this Court is not warranted.[6]

1. As this Court has held repeatedly, "[t]he controlling principle" of desegregation remedies "is that the scope of the remedy is determined by the nature and

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[6] Although petitioners have not presented it as a separate question, there is a substantial question whether the court of appeals erred in holding that respondents had standing to challenge the site selection criteria. The court of appeals ruled that "[t]he remedial order's explicit racial classification alone is sufficient to confer standing" on respondents. Pet. App. 12. As this Court has held, however, "even if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *United States* v. *Hays*, 515 U.S. 737, 743-744 (1995) (citation and internal quotation marks omitted). Respondents were not "personally denied equal treatment" by the use of race in the selection of sites for public housing. They were not denied housing or the opportunity to compete on an equal footing with any other group. They did not allege or prove that the use of the sites for public housing would deprive them of any contract or property rights or would be inconsistent with local zoning or other land use restrictions. Nor did they allege or prove an injury comparable to that recognized by this Court in its recent redistricting cases. *Shaw* v. *Reno*, 509 U.S. 630, 647-648, 650, 657 (1993), for example, held that a redistricting plan that segregates voters on the basis of race is harmful because it reinforces impermissible racial stereotypes and sends a message to elected representatives that they represent members of only one group. The court of appeals also accorded respondents standing based upon "the potential for neighborhood disruption traceable to improperly managed public housing projects." Pet. App. 15. But in light of the district court's undisturbed factual findings (see p. 7, *supra*), the mere "potential for neighborhood disruption" resulting from the construction of public housing is too speculative, too "conjectural or hypothetical" to constitute "injury in fact" to the respondents. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*) (citing *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); see also *United States* v. *Virginia*, 518 U.S. 515, 547 (1996); *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). This principle "means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977) (*Milliken II*); see also *United States* v. *Virginia*, 518 U.S. at 547. Courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The remedy must be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I*, 418 U.S. at 746. Where policies traceable to a racially dual system persist, and continue to have a segregative effect, they must be "reformed to the extent practicable and consistent with sound" practices. *United States* v. *Fordice*, 505 U.S. 717, 729 (1992); see *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 458 (1979) (school officials have continuing obligation to dismantle racially dual school system).

2. The court of appeals accepted that "[t]he history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation," Pet. App. 4, and that a remedy for the victims of that discrimination was necessary. The court did not dispute that the district court's responsibility was to fashion a remedy that would root out and eliminate the unconstitutional discrimination and its vestiges. It held, however, that the remedy that the district court

adopted made unnecessary use of race. That conclusion was mistaken.

a. The court of appeals' key error consisted in its finding that the first two factors—"the necessity for relief" and the "efficacy of alternative remedies"—"weigh against race-conscious site selection." Pet. App. 22. In the analysis of these factors, the court placed greatest weight on what it believed to be the availability of Section 8 housing vouchers as an equally effective, but race-neutral, remedial mechanism. Indeed, it described the district court's findings that Section 8 vouchers under the remedial order had made significant progress in finding desegregative housing opportunities for black families as the "one overarching factual finding by the district court * * * that transcends the parties' objections to Section 8 as a remedial measure." *Id.* at 24. In light of what it viewed to be the success achieved by Section 8, the court stated that petitioners, HUD, and DHA "have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination." *Id.* at 25.

(i). Initially, in characterizing Section 8 as applied under the remedial order as a "race-neutral remedial measure," Pet. App. 26, the court of appeals appears to have misunderstood the ways in which Section 8 was used to achieve the desegregative results to which the court referred. The time period during which those results were being achieved—1994 to 1996—was the "time period that DHA's Section 8 mobility program was getting fully underway." *Id.* at 25. As the district court found, the mobility services provided in conjunction with the Section 8 housing vouchers are race-conscious in that they are provided only to African-American applicants and only to those Section 8

applicants who wish to find housing in predominantly white areas. *Id.* at 113-114; see *id.* at 224-225. Although the use of race in the Section 8 portion of the district court's remedy was different from its use in the public housing portion of the remedy, it cannot be said that one was race-neutral and the other race-conscious.

(ii). In addition, in concluding that there was "insufficient evidence" that race-conscious siting of public housing was necessary, the court of appeals failed to take account of undisturbed district court findings regarding the efficacy of the Section 8 program. The court stated that it would "neither accept nor attempt to reject" the district court's findings that

> there are not enough Section 8 units in predominantly white areas; among the available units there is a lack of three and four bedroom units; rents in predominantly white areas are too high to be covered even by Section 8's fair market exception rents; landlords do not want to participate in the Section 8 program; and Section 8 participants become frustrated in looking for housing in predominantly white areas and settle for housing in minority areas.

Pet. App. 24.[7] The court of appeals stated that it similarly would not disturb the district court's finding that

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[7] The district court's factual findings amplified on the difficulties that the court of appeals noted in the ability to use Section 8 vouchers as the sole remedial tool to achieve desegregation. See Pet. App. 145 (noting "limited success of Section 8," despite DHA's "ambitious and thorough program to search for and recruit willing landlords"), 146 (noting other barriers to ability of Section 8 recipients to find an apartment in white areas of Dallas), 147 ("[a]t least 80% of Section 8 families are frustrated in their search for housing

"rental contract requirements in predominantly white areas contain provisions that are difficult for Section 8 families to meet (*e.g.*, high security deposits, requirement of having held a job for the past year, *etc.*)." *Ibid.*

Those undisturbed factual findings should have been sufficient to establish that use of Section 8 vouchers alone could not remedy the past discriminatory siting of public housing in Dallas and that some race-conscious siting of public housing is necessary as a part of the remedy in this case. Those findings established that there were at least some substantial number of public housing families—*i.e.*, enough to fill the 474 new units of public housing at issue in this case, see Pet. App. 31—who would not be able to use Section 8 vouchers. Such families would be forced into the public housing that, because of the history of discrimination that the court of appeals recognized, would inevitably be located only in black neighborhoods. Thus, although the Section 8 remedy may be preferred by many families and could provide the largest portion of the remedy, it could not be sufficient to satisfy the district court's primary obligation under this Court's cases—to provide a complete remedy for the identified racial discrimination practiced by the City of Dallas and its agencies for many decades.

(iii). The court of appeals also erred in concluding (Pet. App. 27) that race-conscious public housing site selection was unnecessary because the use of race-neutral selection criteria, such as geography or the percentage of low-income persons residing in an area, could achieve a desegregative result. The constitutional violation here was the exclusion of public housing

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in white areas"), 164 (noting need for and scarcity of vacant three- and four-bedroom units).

not simply from certain geographic areas or from high-income areas, but from predominantly white areas. The use of non-racial site selection criteria would be successful in remedying *racial* discrimination only to the extent that they were surrogates for race.[8]

b. The court of appeals also erred elsewhere in its application of the *Paradise* factors.[9] Most significantly, with respect to the impact on third parties, the court appeared to rely at least in part on respondents' "fears

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[8] Indeed, such use of non-racial site selection criteria could perpetuate segregation. If the district court's use of non-racial site selection criteria had resulted in the building of *any* additional public housing units in African-American neighborhoods, the net effect would be a perpetuation of the constitutional violation—the continued concentration of public housing in African-American neighborhoods and the failure to provide fair housing opportunities to public housing residents. The district court's mandate was to provide desegregated housing opportunities—not additional segregated ones.

[9] The court of appeals correctly found that the third factor —"the flexibility and duration of relief"—"is neutral in this case." Pet. App. 32 n.37. With respect to the fourth factor— "the relationship of numerical goals to the relevant markets," *id.* at 32—the court of appeals found that the district court had erred in requiring that the new public housing be built in predominantly white areas and defining those areas as ones in which whites—excluding Hispanics—predominated. The undisputed facts in this case showed that the DHA had discriminated against Hispanics, as well as African-Americans, in the siting of public housing in Dallas. See *Walker III*, 734 F. Supp. at 1293 & n.14; *id.* at 1295-1297 & n.17. Even if that were insufficient to support the district court's order that public housing be sited in non-Hispanic white areas, however, the result should have been at most a remand to alter the siting criteria to refer to non-African-American, rather than non-Hispanic white, areas. It should not have led to the court of appeals' much broader remand rejecting the use, at this time, of any racial siting criteria.

of deterioration in their neighborhoods" that would purportedly follow the building of public housing there. Pet. App. 34. The court recognized that the district court had ordered "stringent criteria for the design and upkeep of the projects and for tenant selection" and had "called for the participation of neighboring community members, like [respondents]" in order to ensure that the projects would be satisfactorily designed and maintained. *Id.* at 33. In addition, it is significant that respondents do not own the property on which the public housing would be built, and that that housing will be required to satisfy all zoning and other legal requirements. In light of the safeguards proposed by the district court, as well as respondents' fundamental lack of a legal basis to complain of how a nearby property owner chooses to use its property within whatever land-use and other legal regulations apply to that property, it cannot be said that the likely impact on innocent third parties cuts against the district court remedy.

3. Although the court of appeals misapprehended the facts of this case in applying the *Paradise* factors to the district court's remedial order, that error does not warrant further review.

a. First, the court of appeals' ruling that the site selection requirement was not narrowly tailored resulted primarily from its conclusion that, because the Section 8 program was a race-neutral alternative that had already shown "promising results" as a desegregation remedy and that "could be even more successful" with additional resources, Pet. App. 26-27, there was "insufficient evidence to show that the district court's race-conscious site-selection criterion is necessary to remedy the effects of past discrimination." *Id.* at 25. Although we disagree with the conclusion that the

evidence was insufficient in that regard, the court's misapprehension of the facts in this case does not warrant review by this Court.

Second, the court of appeals remanded the case to the district court for further proceedings and modification of the remedy order in accordance with its opinion. We do not read that opinion to preclude the district court from reimposing a race-conscious site selection requirement if it finds, based upon a more complete record, that the race-neutral alternatives posited by the court of appeals will not, in fact, fully remedy the violation. In rejecting the district court's finding that the Section 8 program alone was not an adequate remedy, the court of appeals emphasized, for example, that DHA's mobility program had been in effect for only two years at the time of the 1996 evidentiary hearing. See Pet. App. 22. The mobility program has now been in place for an additional three years, and the composite results for the full five years should shed more light on the adequacy of Section 8 as a complete remedy in the circumstances of this case. Similarly, the district court on remand could develop a factual record on the likely results of alternative public housing site selection criteria, such as geography or poverty rate. It could then determine whether such alternatives would lead to the development of new public housing that would dismantle, and not perpetuate, the racially segregated system of public housing that now exists in Dallas.

Third, the decision below does not squarely conflict with the decision of any other court of appeals. See Pet. 12-13. To be sure, the Second and Seventh Circuits have approved similar remedies, requiring the development of subsidized housing opportunities in predominantly white residential areas. See *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir.

1987), cert. denied, 486 U.S. 1055 (1988)[10]; *Gautreaux* v. *Pierce*, 690 F.2d 616, 622-623 (7th Cir. 1982); *Gautreaux* v. *Chicago Hous. Auth.*, 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922 (1971); see also *Hills* v. *Gautreaux*, 425 U.S. 284, 299, 301 (1976) (noting that it was "entirely appropriate" and "supportive of well-established federal housing policy" to require the creation of housing opportunities in suburban Chicago as a remedy for the unlawful concentration of most public housing in poor, black neighborhoods of Chicago). But neither *Yonkers* nor the *Gautreaux* decisions considered a challenge to such a remedy on the ground that it was not narrowly tailored to serve a remedial purpose and therefore violated the Equal Protection Clause.

Nor do the other older court of appeals decisions—the most recent of them decided 17 years ago—cited by petitioners (see Pet. 13) squarely conflict with the decision below. *Otero* v. *New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973), *Shannon* v. *HUD*, 436 F.2d 809, 821-822 (3d Cir. 1970), and *Alschuler* v. *HUD*, 686 F.2d 472 (7th Cir. 1982), all concluded that HUD (or, in the case of *Otero*, the New York City Housing Authority), has an affirmative obligation to consider the impact of proposed housing projects on the racial composition of the surrounding areas. But none of these decisions applied narrow tailoring analysis to a

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[10] The court of appeals here erroneously cited *Yonkers* as an example of geographic, rather than race-conscious, site selection criteria. See Pet. App. 27. As the Second Circuit recognized, East Yonkers, the geographic area designated for public housing, is the predominantly white area of Yonkers, from which subsidized housing had been excluded. See 837 F.2d at 1184 (referring to requirement that the City select public housing sites in "non-minority" areas).

site selection requirement like the one in the remedy order in this case or considered the efficacy of alternative means of promoting integrated housing. *Otero* did not concern site selection at all, but rather the selection of tenants for a new housing project.[11] *Shannon* held that HUD was required by the Fair Housing Act and by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, to consider the effect of a proposed housing project on the racial composition of the surrounding area, but did not concern an affirmative requirement that housing be built in any area based upon race. And *Alschuler* affirmed a district court's denial of a preliminary injunction to block the development of a new housing project, holding that HUD had adequately considered the racial impact of the project before approving it.

Finally, the court of appeals expressly declined to consider the validity of HUD's site and neighborhood standards, which require the consideration of race in HUD's consideration of proposed public housing sites. See 24 C.F.R. 941.202(c). Thus, contrary to petitioners' contention (Pet. 9-12), the decision below does not warrant review because of any perceived inconsistency with those standards.

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[11] The holding in *Otero* was substantially limited by the Second Circuit's subsequent decision in *United States* v. *Starrett City Associates*, 840 F.2d 1096, 1100-1103 (2d Cir.), cert. denied, 488 U.S. 946 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

MOTION FILED
OCT 18 1999

(3)

No. 99-296

IN THE

SUPREME COURT OF THE UNITED STATES

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

Petitioners,

v.

CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

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CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Lawyers' Committee for Civil Rights Under Law moves for leave to file a brief as *amicus curiae*. Proposed *amicus* draws on its own experience and offers analyses of the subject matter of the petition that differ from those of Petitioners. Petitioners and the United States, as a Respondent, have consented to the filing of this brief. Consent has not been received from Highlands of McKamy IV and V Community Improvement Association, et al., who have filed a waiver of response to the petition, or from the Housing Authority of the City of Dallas or the City of Mesquite.

Respectfully submitted,

_____

Thomas J. Henderson

Dated: October 18, 1999

QUESTION PRESENTED FOR REVIEW

Amicus suggests that an alternative formulation of the question presented might be considered by the Court, as follows:

Whether the narrow tailoring inquiry as to a remedy order providing for the race-conscious selection of sites for public housing, fashioned to afford prompt and effective relief to the victims of unconstitutional racial segregation, requires that a court identify the particular unconstitutional conditions to be addressed by that remedy, assess the relative effectiveness of race-neutral site selection alternatives, and distinguish race-conscious from race-neutral remedies.

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a national civil rights organization, established in 1963 at the request of President Kennedy to involve private lawyers in a national effort to assure civil rights for all Americans. The Lawyers' Committee, enlisting the services of hundreds of private attorneys, has represented thousands of clients in litigation to remedy racial discrimination, including in federally assisted housing programs.

The Lawyers' Committee has substantial knowledge of and experience in cases involving the *de jure* segregation of public housing. It currently represents clients in three such cases, two of which implicate race-conscious site selection remedies, to develop public housing in white communities from which it has been excluded. The Lawyers' Committee also advocates public policy urging that federal and other public authorities effectively eliminate all vestiges of the housing segregation they and their predecessors have established and perpetuated in communities throughout the nation.

The Lawyers' Committee submits this brief *amicus curiae,* to suggest that this Court accept review of this important case in order to confirm that, in formulating prompt and effective relief for unconstitutional racial segregation in public housing, appropriate, carefully fashioned race-conscious

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[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

site selection remedies satisfy narrow tailoring principles.

STATEMENT OF THE CASE

The factual background of this case is fully recounted in the Petition for a Writ of Certiorari and is not repeated here. Below, however, is a recitation of portions of the procedural history and record relevant to the issues raised in this brief.

1. The Separate Public Housing and Section 8 Programs and the Distinct Constitutional Violations in Each Program

The Dallas Housing Authority operates two separate and distinct federal programs that provide low-income housing. The first is the conventional public housing program, or "housing units owned and operated by DHA." App. at p. 4 n.3.[2] Conventional public housing is comprised of fixed units that are sited, developed, managed and otherwise controlled by DHA. These units are offered to qualifying low-income persons at a rent not exceeding 30% of their income. See 42 U.S.C. § 1437.

The second federal housing program administered by DHA is the Section 8 program, through which DHA subsidizes the rents of eligible low-income participants who reside in participating privately owned housing units through the use of

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[2] References to the decisions below are to the appendix to the Petition for a Writ of Certiorari. The decision of the Fifth Circuit Court of Appeals, *Walker v. City of Mesquite, Tex.*, 169 F.3d 973 (5th Cir. 1999), is contained at pp. 1-35. The decision of the district court, *Walker v. HUD*, No. 3:85-CV-1210-R (N.D. Tex. Oct. 6, 1997), is contained at pp. 66-209.

certificates and vouchers. *See* App. at p. 4 n.3. In order to utilize a voucher or certificate, the participant must find a landlord willing to enter into a lease with the participant and DHA, subject to certain regulatory conditions. *See* App at 141. The Section 8 housing program differs fundamentally from the conventional public housing program in that the number and location of housing units are largely beyond the control of DHA, because the Section 8 program depends entirely upon the availability of privately owned housing and the willingness of its owners to lease to an eligible participant and DHA.

It is undisputed that for decades the defendants in this case committed distinct constitutional violations in both the conventional public housing program and the Section 8 program in Dallas. *See id.* at p. 5. Through its various orders in this case, the district court fashioned relief to remedy those two separate and distinct constitutional violations. *See id.* at 72-85.

Specifically, conventional family public housing was originally sited and built only in minority neighborhoods and, in order to keep such housing and its residents out of non-minority neighborhoods, DHA refused to build any new family public housing in Dallas from 1955 until the construction of 100 units pursuant to the 1987 consent decree in this case. *See id.* at p. 78. As a result of its racially discriminatory siting practices and refusal to develop public housing, as of September 27, 1994, 6,133 of the 6,411 units in DHA's family public housing projects were located in predominantly black or minority concentrated areas. *See id.* at p. 86.

With regard to the Section 8 program, it is undisputed that DHA and the City of Dallas developed and implemented

policies to steer minority Section 8 families to housing in minority areas and to keep them in segregated public housing. *See id.* at pp. 84-85. For example, in the 1970s, DHA allowed only a few tenants to use Section 8 certificates in the suburbs and then completely halted the practice. *See id.* at p. 84. In addition, city inspectors consistently approved units for black families in black neighborhoods that were in serious violation of HUD's housing quality standards. *See id.* at pp. 84-85. As a result, as of September 27, 1994, approximately 60% of the black households in the Section 8 program lived in predominantly black or racially concentrated areas. *See id.* at p. 86.

2. The Race-Neutral Remedies in the Consent Decree and Their Failure to Remedy the Violations

A consent decree addressing the distinct constitutional violations in the public housing program and the Section 8 program was approved by the district court in 1987.[3] The relief provided in that decree for each of the violations was generally race-neutral. *See Walker*, 734 F. Supp. at 1247-62 (N.D. Tex. 1989). Specifically, as to the public housing site selection violation, the decree required, *inter alia*, the demolition of approximately 2600 units of public housing and their replacement on a one-to-one basis with additional public housing units and Section 8 certificates and vouchers. *See id.* Of the replacement public housing units, 100 were required to be sited in non-minority areas. No race-conscious criteria were required with respect to the remaining replacement units. *See*

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[3] The Consent Decree is contained as Appendix A in *Walker v. U.S. Dept. of Housing & Urban Dev.*, 734 F. Supp. 1231, 1247 (N.D. Tex. 1989).

id. App. at 92. As to the violations with respect to the Section 8 program, the decree required the establishment of a Section 8 mobility plan to assist families in finding available private housing. The objectives of the Section 8 mobility program were race-neutral; to facilitate the use of vouchers and certificates in *non-Section 8 impacted* areas of Dallas. *See id.* at 1259-60.

The race-neutral remedies of the consent decree failed to remedy the violations in either the public housing program or the Section 8 program. With regard to public housing site selection, DHA refused to develop public housing units in white areas even after entry of the 1987 consent decree. DHA violated its obligation to develop the 100 units required to be sited in white areas, requiring the district court to order the siting of those units. *See* App. at 81, 92. Moreover, the defendants "continued to propose the development of all additional new public housing units in the predominantly minority West Dallas area." *Id.* at 92. Efforts to site public housing in white areas were met with "strenuous and effective neighborhood and political opposition." *Id.*

With regard to the Section 8 program, the mobility remedy did achieve its race-neutral goal of utilization of 50% of the certificates and vouchers in non-Section 8 impacted census tracts. *See id.* at p. 99. But, as the district court noted, "[t]his accomplishment did not erase the effects of discrimination." *Id.* The race-neutral mobility program largely replaced one set of Section 8 impacted minority census tracts with another set of such tracts. *See id* at p. 99-100. Although some progress toward desegregation was made, the Section 8 program remained predominantly segregated. "While the overall racial concentration of DHA's certificate holders has

improved somewhat, less than 21% of the black families on the program live in predominantly white areas while over 45% of white DHA white [sic] Section 8 families live in such areas." *Id.* at p. 100.

3. The Distinct Race-Conscious Remedies Ordered by the District Court and Their Effectiveness

In light of the failures of the consent decree and the defendants' violations of its terms, the district court vacated the decree, determined the defendants' liability ,and formulated a its own remedial orders that included race-conscious remedies. With regard to public housing, the remedial order affecting DHA required the development of all new public housing units in predominantly white areas until the number of units in white areas equaled the number of units in minority areas. "These units, and any others allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas." *See id.* at p. 87. In addition, the remedial order contained provisions to ensure that the public housing units were maintained, and to afford nearby property owners a role in the planning and management of new public housing. *See id.* at p.88.

With regard to the Section 8 program, the remedial order required mobility counseling for African-American families in the Section 8 program to assist them in finding available private housing in predominantly white areas. "The mobility services are to be provided to black DHA participants for the purpose of achieving and maintaining a percentage of

DHA's Section 8 in predominantly white areas." *Id.* at p. 91. Under that program, "[w]hite families do not get the mobility services required under the decree" and "[b]lack Section 8 participants do not get the use of mobility services to help locate housing in minority areas." *Id.*

The white homeowners' challenge was essentially directed at the provisions in the remedial orders requiring the siting of new public housing units in predominately white areas until equal to the number of units in minority areas. In rejecting that challenge, the district court considered alternatives to the race-conscious site selection required in its remedial order and found that none of those alternatives would remedy the violations in the public housing program in this case. As the court noted, allowing or requiring new public housing units in minority or racially integrated areas would only perpetuate the vestiges of prior segregation and the unequal conditions and opportunities afforded white families and black families. *See id.* at pp. 100-01. The district court also considered, and rejected, the alternatives proposed by the defendants and the white homeowners (which included, *inter alia*, non race-conscious site selection methods and conversion of public housing allocation to Section 8 vouchers and certificates) because those plans would not remedy the segregation in the public housing program. *See id.* at pp. 101-11. The district court specifically found that without race-conscious remedial measures, desegregation would not be accomplished. *See id.* at pp. 100-14. As the court explained, any new public housing developed by DHA will be placed in either a white area, minority area, or racially mixed area. *See id.* at p. 106. Because placing such housing in either a minority or racially mixed area would only serve to continue the racial segregation that is at issue, the only option available to remedy the segregation is to require the placement of such housing in a

white area. *See id.* at p. 107.

4. The Court of Appeals' Decision

The only issue presented on appeal was the constitutionality of the race-conscious site selection relief in the district court's remedial order affecting DHA, providing that construction of new public housing units be in predominantly white areas of Dallas. *See* App. at p. 2. The Court of Appeals held the race-conscious site selection criteria unconstitutional and directed the district court to employ only race-neutral site selection criteria to the development of new and replacement public housing. *See id.* at p. 27. In reaching its decision, the court of appeals did not review, analyze, set-aside or disturb the fact findings of the district court that race-neutral site selection criteria had not been, and would not be, effective in remedying the public housing site selection violation. The court of appeals summarily concluded that: "The district court's concern that if it does not attach a race-conscious site selection criterion to new construction, then the new units will end up in minority areas and, as a consequence, Dallas's public housing projects will almost all remain in minority areas, is unfounded." *Id.*

SUMMARY OF ARGUMENT

This Court should review the decision of the court of appeals because decisions regarding segregation in the federal public housing program affect a vast number of families, hundreds of local government authorities, and federal policy. This case represents a rare opportunity to review a judgment on the question of appropriate remedies in this area, and presents a thoroughly developed record.

The test of narrowly tailoring articulated and applied by the court of appeals departs substantially from that established in this Court's jurisprudence. This Court should grant review to correct and provide further guidance to the courts and public authorities regarding the purpose, elements, and application of the narrow tailoring inquiry.

This Court should accept review to resolve a conflict in the courts of appeals regarding the proper consideration of race in remedying, and preventing, discrimination in public housing.

ARGUMENT

1. The Decision of the Court of Appeals Involves a Question of Great National Importance.

The question presented in the Petition for Certiorari is of great national importance. There are 1,238,490 units of public housing in this nation, in 14,814 public housing projects, administered by 1,926 public housing authorities.[4] HUD funds and oversees the operation of this public housing, administered on a local level by housing authorities. Judicial decisions regarding the administration of the nation's public housing program therefore affect an enormous number of families, nearly two thousand local housing authorities, and the policies and actions of the federal government.

This vast public housing program is racially segregated. According to HUD: "African-American public housing

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[4] Goering, Kamely, and Richardson, U.S. Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States* 12 (1994).

residents typically live in African-American neighborhoods; white public housing residents live in white neighborhoods;" and ". . . African American residents living in family projects are housed in segregated projects in severely poor neighborhoods."[5] This segregation is not fortuitous. Public housing was established pursuant to local and federal policies of *de jure* segregation.[6] *De jure* segregation in public housing largely has been perpetuated through federal and local policies and, to the limited extent that federal and local officials have acted to relieve that segregation, they have been "largely ineffective."[7] HUD leadership in administrations of both political parties have acknowledged the obligation to remedy the conditions and effects of this segregation, and recognized that federal and local housing officials must have available the full range of lawful remedial measures if that objective is to be

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[5] *Id.* at 1, 78.

[6] *See* Discrimination in Federally Assisted Housing Programs, 1986: Hearings Before the Subcomm. on Housing and Community Development of the Comm. on Banking, Finance and Urban Affairs, House of Representatives, 99th Cong. (1986), particularly 16-19 (statement of HUD General Counsel John Knapp) and 15-16 (statement of HUD Secretary Pierce); Achtenberg, Keynote Address, Symposium *Shaping American Communities: Segregation, Housing & the Urban Poor,* 143 U. Pa. L. Rev. 1191, 1193 (1995) ("That the federal government, including HUD, has a long history of having precipitated and perpetuated housing discrimination, there can be no question. At their inception, federal housing programs incorporated many of the prevailing practices of the private housing market and were explicitly discriminatory as a result."); Statement of the President on Federal Policies Relative to Equal Housing Opportunity, 1 FH-FL 5121 (June 11, 1971).

[7] Achtenberg, *supra* note 6 at 1193; *See* 62 Fed. Reg. 1026, 1028 (January 7, 1997); Hearings, *supra,* at 15 - 16 (statement of Knapp).

accomplished.[8] Accordingly, the substantial limitations on the availability of race-conscious remedial measures expressed in the decision of the court of appeals can profoundly affect the capacity of federal and local officials to address longstanding segregation.

As the most recent pronouncement of a court of appeals on the subject, and one that suggests that the applicable law has changed since this Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976), there is a significant risk, in the absence of review by this Court, that HUD and other federal officials will apply nationally the result reached by the court of appeals in this case. So, too, local housing authorities may well conclude that they are without the ability to consider race in any effort to remedy, or to prevent, further racial segregation. It is not unlikely that the decision of the court of appeals will, therefore, affect the obligations of hundreds of local housing authorities and the fate of tens of thousands of families, without further opportunity for review by any court.

This case is an ideal vehicle for this Court's review of the permissible consideration of race to remedy constitutional violations regarding federally assisted housing. Cases challenging racially discriminatory public housing site selection are difficult and expensive because they require an extensive examination of evidence of the decisions and actions taken by federal and local government authorities over decades. Therefore, despite the prevalence of racial segregation in public

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[8] *See* Achtenberg, *supra* note 6; Hearings, *supra* note 6 at 15 - 16 (statement of Pierce); Memorandum from HUD Secretary Pierce Concerning Public Housing Desegregation, 1 FH-FL 5133, 5134 (February 28, 1984). *See also* Statement of the President, *supra*, 1 FH-FL at 5129.

housing nationally, relatively few cases are litigated, and even fewer are brought to a litigated conclusion. Thus, this case presents a rare opportunity to address an issue affecting large numbers of local governing authorities and the housing conditions of tens of thousands of families. Moreover, the extensive record in this case, the parties' attempt to remedy the violations through race-neutral means embodied in the consent decree, and the courts' subsequent assessment of the propriety of race-conscious relief offer a thoroughly developed record on which to decide squarely the question presented.

2. The Decision of the Court of Appeals Substantially Departs from This Court's Precedent Regarding the Obligation of Courts to Afford Victims of a Constitutional Violation Prompt and Effective Relief That Is Narrowly Tailored to Remedy the Violation.

The court of appeals formulated and applied a narrow tailoring analysis that profoundly confuses both the analysis to be undertaken and the factors to be assessed. If left unreviewed, its approach would transform the narrow tailoring inquiry from one designed to ensure that race-conscious relief is reasonably necessary, remedial in nature, and fashioned substantially to address the conditions resulting from the violation, into a flat prohibition on race-conscious relief where *any* race-neutral alternative exists, even if it is clear that the race-neutral alternative will not remedy the violation. The analysis of the court of appeals would constrain courts and public bodies considering race-conscious remedies in a manner that would deny to many victims any effective relief. Such a standard of narrow tailoring defies this Court's admonition that strict scrutiny is *not* "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 202 (1995).

The court of appeals' approach to narrow tailoring

incorporates several fundamental errors. First, the court failed to identify the particular, distinct, unconstitutional conditions to be addressed by the remedial order. This failure caused the court to consider two distinct remedies for two distinct violations in two distinct housing programs as though they were competing alternative remedies for a single violation. Second, the court did not assess the relative effectiveness of race-neutral, as compared to race-conscious, public housing site selection criteria. This failure led the court to enjoin the use of race-conscious site selection criteria, despite undisturbed findings that race-neutral criteria had not, and would not, effectively cure the unconstitutional conditions resulting from racially discriminatory site selection violations. Third, the court failed to distinguish race-conscious from race-neutral relief, leading it to assess one of the distinct race-conscious remedies as though it was a race-neutral alternative to the other distinct race-conscious remedy. This resulted in the court's failure to apply an appropriate narrow tailoring analysis to either of the two remedies ordered by the district court. It also resulted in the court's erroneous conclusion that the distinct remedy it mistakenly perceived to be "race-neutral" should be substituted as a race-neutral alternative for the distinct remedy it did recognize to be race-conscious. Accordingly, this Court should grant certiorari to correct and clarify the formulation and application of the standards of narrow tailoring in fashioning prompt and effective relief for constitutional violations.

The court of appeals' analysis loses sight of the fundamental obligation to fashion prompt and effective relief for constitutional violations. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684 (1946). This court in *Louisiana v. United States*, 380 U.S. 145, 154 (1965), stated that where racial discrimination is involved, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the

discriminatory effects of the past as well as bar like discrimination in the future." In *Missouri v. Jenkins*, 515 U.S. 70 (1995), this Court reiterated a three-part framework regarding the exercise of remedial authority. The Court required district courts to consider the following: "[1)] the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . [; 2)] the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'. . . . [; and 3)] federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 88 (quoting *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*)) (emphasis in original); *United States v. Paradise*, 480 U.S. 149 (1987); *see also Shaw v. Hunt*, 517 U.S. 899, 915-916 (1996);. The analysis set forth by the court of appeals fails to follow this long-established precedent in evaluating the relief ordered by a district court.

More specifically, with respect to the first of the court of appeals' fundamental errors, it failed to examine closely the violations to be remedied, the distinct character of the two housing programs affected by the constitutional violations, and the purposes to be served by the two remedies. This failure led it to misperceive the remedial objective as simply "moving black families into white areas" through the Section 8 program, App. at p. 26, ignoring the nearly complete segregation of existing public housing units in minority areas and the need to ensure that further segregation did not result from the siting of new public housing. This formulation of the "narrow tailoring" inquiry is ill-founded because the remedy does not address the nature of the violation, and instead compares apples with oranges with respect to the efficacy of alternatives.

For this reason the court of appeals did not assess the

effectiveness of race-neutral versus race-conscious site selection standards, but compared only race-conscious site selection standards to the mobility program regarding the use of Section 8 certificates and vouchers:

> Based on the relative success of DHA in moving blacks into predominately white areas *via its Section 8 program* between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination.

App. at p. 26 (emphasis added). The Section 8 mobility program, however, is a wholly distinct remedy designed to address the separate violation of DHA's discriminatory administration of the Section 8 program. The Section 8 mobility program neither speaks to, nor is capable of affecting, the selection of sites for the ongoing construction of new public housing. Whatever the effectiveness of the Section 8 mobility program, it simply does not answer the question whether race-neutral, as opposed to race-conscious, site selection criteria will effectively remedy the site selection violation with respect to the new public housing that will be constructed.

The court of appeals was largely consumed with the suggestion by the white homeowners that the Section 8 program alone could remedy both the public housing site selection and the Section 8 steering violations. On that question, the court of appeals "neither accept[ed] nor attempt[ed] to reject the factual findings" of the district court that both the Section 8 mobility program and race-conscious site selection for the construction or acquisition of new public housing were necessary to remedy the violations in the two housing programs. App. At p. 24. Instead, focusing solely on the fact that an additional 285 black families had used Section

8 vouchers in white areas in the two-year period between 1994 and 1996, *see* App. at pp. 22-26, the court of appeals reached its conclusion, quoted above, that the district court erred in determining that race-conscious site selection criteria were necessary for new public housing to be constructed in Dallas. To the extent that the court of appeals was attempting to undertake the narrowly tailoring inquiry of the efficacy of alternative remedies, as noted above, it failed to comprehend that the Section 8 mobility program has no effect on the selection of sites for the new public housing that is being developed.

With regard to the second fundamental error, beyond the distractions and incongruities of its analysis of the Section 8 mobility program as an alternative remedy, on the specific question of whether race-conscious site selection criteria were necessary to remedy the public housing violation, the court of appeals not only failed to undertake an analysis of that question, but reached a conclusion contrary to the express findings of the district court that race-conscious site selection criteria were necessary. In less than one paragraph, the court of appeals suggested that site selection criteria based on geography or poverty levels were available and, without any analysis or discussion of the application or effectiveness of those criteria or the district court's findings on the issue, simply concluded that the district court's concern that, absent race-conscious criteria, "the new units will end up in minority areas and, as a consequence, Dallas' public housing will almost all remain in minority areas, is unfounded." App. at p. 26.

Thus, the court made no examination of the effectiveness of race-neutral site selection standards and ignored, but left undisturbed, the careful and appropriate analysis of the relevant factors and record facts bearing on that question through which the district court determined that race-neutral site selection criteria had been and would continue to be ineffective. Yet, the court of appeals determined that race-

conscious site selection criteria were not narrowly tailored because race-neutral criteria were available. *See* App. at p. 27, 28. That race-neutral measures are available, as they will always be, does not answer the question the narrow tailoring inquiry demands – will the race-neutral measures promptly and effectively remedy the violation. Thus, the court of appeals' standard of narrowly tailoring fails the essential test applied to the formulation of any remedy – whether it will effectively cure the violation.

Regarding the third error, the "narrow tailoring" analysis of the court of appeals fails to apply a consistent definition of race-consciousness to remedies it considered as alternatives. Simply stated, the analysis fails to recognize that both the public housing site selection criteria *and* the Section 8 mobility program ordered by the district court are race-conscious. The court of appeals' formulation of the narrow tailoring inquiry is fatally flawed because it considered the Section 8 mobility program to be "a race-neutral measure," App. at p. 26, and therefore assessed it as an "option[] . . . [that] should be explored and tested before adopting a race-conscious remedy as a last resort." *Id.* at p. 27. Because the Section 8 remedy was race-conscious, the court of appeals lacked a basis on which to suggest that it was a race-neutral alternative to race-conscious site selection criteria. This failure to recognize the race-conscious character of the Section 8 remedy therefore undermines the essential basis on which the court rejected race-conscious site selection criteria as an appropriate remedy.

The test of narrowly tailoring constructed by the court of appeals is one that dispenses with the need to identify the precise conditions that offend the Constitution and are to be remedied, abandons any inquiry into whether race-neutral alternatives will be effective in remedying the violation, and foregoes the need to identify relief as race-conscious or to distinguish race-conscious from race-neutral relief. This Court should grant review in this case to provide further guidance in

the purpose of the narrowly tailoring inquiry in assessing appropriate, effective relief and to clarify the factors to be considered in the inquiry and the proper analysis of those factors.

3. The Court of Appeals' Decision in this Case Creates a Conflict Between the Circuits.

The decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other circuits on the propriety and availability of race-conscious site selection criteria as a remedy for the unconstitutionally segregated location of public housing. In *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236-37 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988), the Court of Appeals for the Second Circuit explicitly approved an order to build federally funded low-income housing only outside of minority areas as an appropriate remedy for *de jure* segregation in public housing site selection. In that case, the Court found that such an order was "closely tailored" to the constitutional violations to be remedied.[9] In *Gautreaux v. Pierce*, 690 F.2d 616, 622-23 (7th Cir. 1982), the Court of Appeals for the Seventh Circuit affirmed the approval of a consent decree under which HUD was obligated to develop public and assisted housing opportunities in non-minority areas.

In addition, although the appropriateness of utilizing a race-conscious remedy was not squarely before this Court in the *Hills* case, this Court observed that it was "entirely appropriate"

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[9] The Fifth Circuit erroneously characterizes the *Yonkers* decision as an example of race-neutral site selection based only on geographical regions. *See* App. at p. 27. In that case, the Second Circuit recognized that the geographical region designated was identified by reference to its white population, from which subsidized housing had been excluded. *See Yonkers*, 837 F.2d at 1184.

for the Chicago Housing Authority and HUD to be ordered to create housing opportunities in the predominantly white Chicago suburbs as a remedy for the unlawful concentration of most public housing in poor, black neighborhoods. 425 U.S. at 299-301.

The Court of Appeals' decision in this case also conflicts with decisions of other circuits that have held that race may be considered in remedying unconstitutional racial discrimination in housing programs. *See Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982) ("As part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation."); *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970) (holding that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts").

The decision of the Fifth Circuit in this case stands alone in reaching the result that race-conscious site selection criteria may not be utilized in remedying the segregation resulting from purposefully discriminating siting decisions. Accordingly, this Court should grant certiorari in order to resolve the conflict between the Fifth Circuit decision in this case and the decisions of other circuits, and with this Court's decision in the *Gautreaux* case.

CONCLUSION

On basis on the foregoing, *Amicus* respectfully suggest that this court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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October 18, 1999

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Supreme Court, U.S.
FILED
NOV 2 - 1999
OFFICE OF THE CLERK

(4)

No. 99-296

In The

Supreme Court of the United States

DEBRA WALKER, ET AL.,

Petitioners,

v.

CITY OF MESQUITE, TX; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The homeowner respondents waived filing an opposition to certiorari but oppose the petition on the grounds that the court of appeals' decision was correctly decided. [Sept. 16, 1999 letter from Robert E. Goodfriend to William K. Suter, Clerk, Supreme Court of the United States]. The Federal Respondent has filed a forceful argument that the court of appeals' judgment is erroneous, that the homeowners were not denied equal protection of the law, and that the appeals court misapplied the controlling remedial principles set out by this Court in *United States v. Paradise*, 480 U.S. 149 (1987) and other cases. [Brief for the Federal Respondent in Opposition, pages 12 n.6, 14, 17].

Despite its persuasive analysis of the court of appeals' errors, the Federal Respondent opposes review of the judgment on several grounds: a) that the court of appeals also misapprehended the facts of the case thus making the decision fact bound; b) the judgment is interlocutory since the district court may still enter a race-conscious remedy on remand; and c) the judgment does not squarely conflict with any other court of appeals opinion.

The Federal Respondent leaves unanswered petitioners' arguments that the erroneous decision was caused by the appeals court's usurpation of the primary role of the district court in assessing the appropriate remedy and that the decision contradicts a longstanding national policy – endorsed by this Court, implemented by HUD, and applied by other circuit courts of appeals – that acknowledges the necessity of using race-conscious

site selection to remedy public housing segregation. In addition, the court of appeals' decision does squarely conflict with the Federal Respondent's interpretation of the Second Circuit's opinion in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). With respect to the declaratory judgment in favor of petitioners entered by the district court, the court of appeals' judgment vacating that judgment is not interlocutory.

1. The court of appeals did not just misapprehend some of the facts in this case. As Petitioners argue, one of the grounds for granting the writ of certiorari is that the appeals court misapprehended its entire role in the remedial process [Pet. 19-23]. The district court made specific findings that, as of the 1994 hearing for the 1995 remedial order, the Section 8 program itself was still marked by the vestiges of the acknowledged, overt segregation. The district court further found that the implementation of the Section 8 remedy since the 1995 remedial order showed that the continued existence of barriers to the use of Section 8 in white areas precluded exclusive reliance on the use of that program to remedy the racially segregated site selection decisions of the defendants [Pet. App. 51, 54, 86, 99-100, 140-148, 152].

The court of appeals did not misapprehend that these were the district court findings. It did not rule that the findings were clearly erroneous or even unsupported by sufficient evidence [Pet. App. 24]. Instead, the court of appeals chose to use its view of the progress of the Section 8 program as revised by the remedial order to strike down the district court's public housing remedy. The court of appeals re-balanced its view of the record

with the results obtained under two years of the new remedial Section 8 program and found that those results "transcended" all of the findings on existing barriers to the desegregation of the Section 8 program. [Pet. App. 24]. The Federal Respondent did not rebut, or even mention, petitioners' argument that certiorari should be granted because the court of appeals could reach its erroneous decision only by usurping the district court's discretion to choose a remedy after balancing the competing interests within statutory and constitutional limitations. *U.S. v. Paradise*, 480 U.S. at 183-184; *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995). The court of appeals' violation of the clear and well-established allocation of remedial responsibility is the primary flaw in the judgment which the Federal Respondent recognizes is marked by numerous and serious legal errors.

2. The court of appeals' judgment vacating the declaratory judgment is not interlocutory. Petitioners obtained a declaratory judgment that the 1995 remedial order at issue was constitutional [Pet. App. 3]. The court of appeals specifically vacated that declaratory judgment [Pet. App. 35]. Even if a new race-conscious site selection remedy were entered on remand, that declaratory judgment will have been permanently vacated.

3. Petitioners' argument that this Court should review the judgment because of the conflict between the court of appeals' decision and the national policy requiring the use of race-conscious remedies was not answered by the Federal Respondents. The national policy has been approved by this Court. *Hills v. Gautreaux*, 425 U.S. 284, 301 (1976). The national policy is contained in HUD's site selection regulations for public housing. 24 CFR

§ 941.202(c). The national policy was directly applied by the Second Circuit when it affirmed the race-conscious site selection remedy in *Yonkers*, 837 F.2d at 1236. [Fed. Res. Op. 20 n.10].

As the Federal Respondent points out, neither the policy, the regulations, nor the various courts of appeals' decisions requiring the use of racial classifications even discuss, much less require the "last resort" and exhaustion of race-neutral remedies steps imported into desegregation law by the Fifth Circuit. [Fed. Res. Op. 20-21]. The conflict is clear. The policy does not limit race-conscious remedial steps to the "last resort"; only the Fifth Circuit does.

The Federal Respondent all but acknowledges the split in the circuits when it takes direct issue with the Fifth Circuit's attempt to distinguish the Second Circuit's approval of a race-conscious site selection remedy in the *Yonkers* case. [Fed. Res. Op. 20 n.10]. To be sure, the facts in both cases are somewhat different, but that difference is inevitable given the specific factual focus in all cases involving the use of race-conscious remedies. The major fact difference is the party objecting. In *Yonkers*, the City was the party objecting to public housing in white areas. *Yonkers*, 837 F.2d at 1184. In this case, it is the homeowners in the white areas. But more important than the identity of the party objecting to the race-conscious remedy is the complete difference in approaches to the issue of remedy between the Fifth Circuit and the Second Circuit.

The conflict between the Fifth Circuit's decision, the national policy, and the judicial application of that policy warrants review by this Court.

For the foregoing reasons and those stated in the petition, Petitioners respectfully request that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-296

Supreme Court, U.S.
FILED
DEC 17 1999
CLERK

In The

Supreme Court of the United States

DEBRA WALKER, JEANETTE WASHINGTON, HAZEL WILLIAMS, ZELMA LANG, RENITA BROWN, LILLIE THOMPSON, TRACEY SMITH,

Petitioners,

v.

CITY OF MESQUITE, TX; DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; THE HOUSING AUTHORITY OF THE CITY OF DALLAS; HIGHLANDS OF McKAMY IV AND V COMMUNITY DEVELOPMENT ASSOCIATION; GINGER LEE; PRESTON HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.; DAVID BEER; HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION; and THE CITY OF DALLAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. WHETHER PETITIONERS PRESENTED SUFFICIENT EVIDENCE TO SATISFY THE CONSTITUTIONAL REQUIREMENTS OF NARROW-TAILORING THAT RACE-BASED NEW CONSTRUCTION IN PREDOMINANTLY WHITE AREAS OF THE CITY WAS NECESSARY TO DESEGREGATE PUBLIC HOUSING IN DALLAS WHEN SECTION 8 RENT SUBSIDIES, A SPEEDIER, LESS INTRUSIVE AND RACE-NEUTRAL REMEDY WAS AVAILABLE AND HAD BEEN SUCCESSFUL IN MOVING BLACK FAMILIES INTO WHITE AREAS OF THE CITY.

PARTIES TO THE PROCEEDING

The following listed persons are parties to this proceeding:

Name	
Debra Walker	Petitioner
Jeanette Washington	Petitioner
Hazel Williams	Petitioner
Zelma Lang	Petitioner
Renita Brown	Petitioner
Lillie Thompson	Petitoner
Tracey Smith	Petitioner
City of Mesquite, Texas	Respondent
Department of Housing & Urban Development	Respondent
The Housing Authority of The City of Dallas	Respondent
Highlands of McKamy IV and V Community Development Association	Respondent
Ginger Lee	Respondent
Preston Highlands Homeowners' Association, Inc.	Respondent
David Beer	Respondent
Highlands of McKamy IV And V Community Improvement Association	Respondent
The City of Dallas	Respondent

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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents respectfully submit the following brief in opposition to the Petition For A Writ Of Certiorari:

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-35) is reported at 169 F.2d 973, The opinions of the district court (App. 36-65, 66-206) are unreported.

JURISDICTION

Respondents agree with the statement of jurisdiction in the Petition for Writ of Certiorari.

CONSTITUTION, STATUTES, RULES AND REGULATIONS

The following constitutional, statutory, and regulatory provisions are involved in this case: U.S. Const. Amend. XIV (Equal Protection Clause); 42 U.S.C. § 1983 (1994); The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601, 4626 (1995); 24 C.F.R. § 880.103(a) (1996); and 24 C.F.R. § 941.202(c) (1996) and Rule 10, Supreme Court Rules.

STATEMENT OF THE CASE

Introduction

As detailed below, the Fifth Circuit's decision in this case does not merit review by this Court because it correctly applied strict scrutiny to the district court's race-conscious remedial order requiring the construction of 474 units of public housing in "predominantly white areas" of Dallas. However, before addressing the reasons why the Petition should be denied, Respondents wish to correct one of the assertions in the Petition.

Petitioners state that Respondent Homeowners "sought to keep public housing and *public-housing residents* out of white areas." Pet. at 3. (emphasis added) This is not true. As Petitioners are forced to acknowledge on page 4 of their Petition, Respondents have never sought to keep public-housing residents out of white areas. Respondents have only sought to have the district court use a race-neutral remedy, Section 8 vouchers, before resorting to construction of new public housing in "predominantly white areas" of the city. Homeowners objection to the construction of new public housing in this case is based on (1) the intrusiveness of new construction, (2) the propensity of government owned housing to become slums and (3) the race-based method by which the sites in this case were selected. Homeowners do *not* object to the public-housing residents themselves whether they are white or black. Indeed, Ginger Lee, one of the Homeowners who filed this case, is black.

Facts

Respondents adopt the statement of facts contained in the "Background" section of the Fifth Circuit's opinion, App. 3-10, with one exception. The Court of Appeals states that in "September, 1994, the district court held a trial on the issue of a remedy". App. 7. It then states that "The district court entered its remedial order affecting DHA in February 1995 and its remedial order affecting HUD in April, 1996." App. 7. The conjunction of these sentences gives the misleading impression that the district court's remedial orders in this case, *see* Supp. App. 39 and 60, were the result of contested hearings. In fact, however, the order affecting DHA was purely the result of negotiations between two of the parties to this case, DHA and Petitioners. Supp. App. 6, 7, 13.[1]

It must be remembered that DHA and Petitioners have been litigating this case since it was filed in 1985, App. 3, long before Respondent Homeowners filed their own action in 1996 which was thereafter consolidated with Petitioners' case. During the negotiations leading up to the entry of the district court's order, DHA never made a proposal that did not include some construction of new public housing. Supp. App. 19. Accordingly, the possibility that desegregation could be accomplished without new construction was never considered before Homeowners filed their case. Even the definition of a "predominantly white area", defined as having a minority population of less than 37% but meaning more than 63% white, and the total number of public-housing units to be

[1] Respondents have included a Supplemental Appendix (hereinafter "Supp. App. ___") at the end of this brief which supplies new material not contained in Petitioners' Appendix.

created by the district court's order, were the result of proposals made by Petitioners to DHA. Supp. App. at 15, 16. The district court simply adopted this negotiated order without any consideration of alternatives or of the impact it would have on third parties.

Only in 1996 after the public-housing sites had been selected and Respondent Homeowners had filed their suit, did the district court even consider that its race-conscious order was subject to strict scrutiny. However, after giving Respondents an evidentiary hearing, the district court simply rubber-stamped its original decree derived from the negotiated settlement. It then abrogated the task of making any independent findings by adopting *in toto* the Findings of Fact and Conclusions of Law submitted to it by Petitioners' counsel. App. 24.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly reversed the race-conscious portion of the district court's remedial order which required construction of 474 units of new public housing in "predominantly white areas" of Dallas. It left intact 5,628 units of Section 8 housing. The Fifth Circuit held, after application of the five part test in *United States v. Paradise*, 480 U.S. 149 (1987), that the district court's order was not "narrowly-tailored" because Petitioners had not presented sufficient evidence that race-conscious new construction was necessary when a race-neutral alternative, Section 8 rent subsidies, was available.

Petitioners' argument that review is warranted by this Court because HUD's site-selection regulation is

somehow threatened by the Fifth Circuit's decision is contrary to Petitioners' own assertion below and would require this Court to review a hypothetical case because the Fifth Circuit never addressed the constitutionality of HUD's regulation. There is likewise no conflict between the Fifth Circuit's decision and any decision of this Court or of any sister Court of Appeals. The decisions on which Petitioners rely never applied strict scrutiny to a choice between race-based new construction and race-neutral Section 8 rent subsidies and therefore do not concern "the same important matter" within the meaning of Rule 10 of this Court. There is likewise no conflict between the Fifth Circuit's decision and this Court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) on whether new construction best fits the violation in this case because Petitioners never presented sufficient evidence that it did.

Finally, Petitioners failed to show that the Fifth Circuit did not give proper deference to the exercise of the district court's discretion to fashion a remedy because such discretion had to be exercised "within appropriate constitutional and statutory limits" and was not. The district court applied the wrong legal standards for narrow-tailoring in a number of respects and squandered its discretion by adopting *in toto* Petitioners' Proposed Findings of Fact and Conclusions of Law. App. 24.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. NEITHER NATIONAL PUBLIC POLICY NOR HUD'S SITE-SELECTION REGULATION IS THREATENED BY THE FIFTH CIRCUIT'S DECISION IN THIS CASE AND NEITHER MATTER IS SQUARELY PRESENT FOR REVIEW BY THE DECISION BELOW.

In an effort to make its Petition more appealing to this Court, Petitioners argue that 24 C.F.R. § 941.202(c) (1996)[2], a regulation dealing with site selection for new construction projects funded by HUD, is somehow threatened by the Fifth Circuit's decision in this case. However, this argument is directly contrary to Petitioners own assertion in a memorandum filed in the district court after the Fifth Circuit's decision was rendered. Supp. App. 27 ("the HUD site-selection criteria were not challenged by the Homeowners and were not overturned by the Fifth Circuit.") Furthermore, there is simply no basis for this argument.

The Fifth Circuit's opinion never addressed the constitutionality of HUD's regulation. All the Fifth Circuit held in this case was that it would be premature to order new construction of public housing in predominantly white areas of Dallas as part of a judicially-mandated

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[2] 24 C.F.R. § 941.202(c) (1996) provides as follows: "The site for new construction projects must not be located in: (1) an area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area."

desegregation order when Section 8 vouchers offer a promising race-neutral alternative to desegregate public housing. App. 24-25, 35.

HUD is before the district court in this case not as a governmental agency engaged in an impartial funding decision, but as a defendant that has been ordered by the district court to fund the projects in question in order to make restitution for its own acts of past discrimination. Supp. App. 39; App. 3. By contrast, the constitutionality of the HUD regulation presents the issue of what conditions government may constitutionally impose on the public financing of housing projects that are not the subject of court-ordered desegregation, an issue not presented by this case. There is nothing in the Fifth Circuit's decision which prohibits race-based site selection that results from voluntary agreements entered into between HUD and local housing agencies outside of the context of court-ordered desegregation. To use this case as a vehicle for deciding that issue is therefore to present what is only a hypothetical issue for review by this court.

The language of the Petition itself implicitly acknowledges that the issue raised is not squarely presented by the decision below. The Petition argues that national public policy and the HUD regulation supports and requires the use of a "*similar* race conscious public-housing site-selection procedure". Pet. at 9. (emphasis added). Likewise, Petitioners argue that "[T]he district court remedial order declared unconstitutional by the Fifth Circuit is *similar* to the regulation". Pet. at 10 (emphasis added). Petitioners further argue that the application of narrow tailoring to the remedial order "has the *potential* to affect

the application of the HUD regulation and national policy throughout the country." Pet. at 11-12 (emphasis added).

The use of such ambiguous terms clearly reveals that no national public policy or any HUD regulation is directly implicated by anything decided by the Fifth Circuit. This Court should not accept review of an issue that exists, if at all, only by way of analogy. The constitutionality of the HUD regulation should await decision in a case where it is squarely presented so that this Court will not be taken far afield into undecided matters. An illustration will help make this clear.

If Petitioners were to secure review of this case on the grounds that the Fifth Circuit's decision "potentially" threatens national policy as reflected in HUD's site-selection regulation, then the Court would also have to address the potential impact of other housing regulations and statutes such as 42 U.S.C. § 4626 (1995) and 24 C.F.R. § 880.103(a) (1996) which are applicable in the circumstances of this case, but were not considered below.

In 42 U.S.C. § 4626 (Section of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 entitled, "Housing replacement by Federal Agency as a last resort"), Congress indicated a clear preference for the use and acquisition of existing housing structures such as apartments over new construction in relocating public-housing tenants. A HUD regulation likewise specifies that, with certain exceptions, new housing may only be erected as a last resort. 24 C.F.R. § 880.103(a) (1996). *See also Society Hill Civic Assn. v. Harris*, 632 F.2d 1045, 1056 (3rd Cir. 1980).

The circumstances of this case are directly relevant to the Relocation Act because the district court's order contemplates 2,807 replacement units, App. 31, and the relocation of thousands of public-housing tenants from the demolished units in West Dallas. *See* App. 5, n.5; *Walker v. HUD*, 912 F.2d 819 (5th Cir. 1990). The Relocation Act reflects a congressional preference to use new construction for relocation purposes as "a last resort" and an intent by Congress that relocation of persons "shall be carried out in a manner that entails the minimum disruption of neighborhoods." *Society Hill v. Harris*, 632 F.2d 1045, 1054 (3rd Cir. 1980). The Fifth Circuit's decision in this case declaring new construction of public housing in white areas of the city to be "a last resort measure", App. 34, is supported by the Relocation Act which, as a congressional statute, supersedes any HUD regulation.

Of course, the Relocation Act is not controlling in this case any more than HUD's regulation. The controlling issue here is the constitutionality of alternative remedies in court-ordered remediation of past discrimination. Such decrees are based on constitutional grounds and, as such, are not trammeled by statutes or regulations, even if they may be informed or guided by them.

But there is no need to decide any of these issues. Petitioners have not been denied a remedy because of any misapplication of the HUD regulation. Indeed, Petitioners have not been denied a remedy at all; they have in fact received a full and comprehensive one. *See* Remedial Order Affecting DHA Supp. App. 60. They have only been denied one particular kind of remedy, 474 units of new construction out of a total of 6,012 housing units, App. 31, and only because the evidence offered to justify

it was insufficient. The Fifth Circuit merely held that Petitioners had failed to sustain their burden of producing sufficient evidence to show that race-based new construction instead of race-neutral Section 8 housing meets the constitutional requirements of a narrowly-tailored remedy in the circumstances of this case.[3] *See* App. 19-20, 28-35. Such a fact-specific, evidentiary holding does not require intervention by this Court.

II. NO REAL OR INTOLERABLE CONFLICT EXISTS BETWEEN THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE AND THE DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER.

Petitioners argue that the decision by the Fifth Circuit in this case is in conflict with decisions of the Second, Third and Seventh Circuits because these circuits have applied "the use of racial classifications to individual site decisions without requiring exhaustion of race-neutral efforts," *citing United States v. Yonkers Bd. Of Education*, 837 F.2d 1181, 1236-37 (2d Cir. 1987); *Gautreaux v. Pierce*, 690 F.2d 616, 622-623 (7th Cir. 1982); *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Otero v. New York Housing Authority*, 484 F.2d 1122, 1134 (2nd Cir. 1973); and *Shannon v. HUD*, 436 F.2d 809, 821-22 (3rd Cir. 1970). Pet. at 12-13.

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[3] *Cf. City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500 (1989), *quoting Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 277 (1986) (requiring the City of Richmond to show a "strong basis in evidence for its conclusion that remedial action was necessary."); *Wessmann v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) ("*Croson*, in particular, leaves no doubt that only solid evidence will justify allowing race-conscious action . . . ").

But in none of Petitioners' cases did the Court address or the parties argue that under principles of strict scrutiny of race-conscious judicial decrees, a race-neutral remedy – Section 8 vouchers that could be used in "any area" of the city – constituted a less intrusive but still adequate remedy that should be tried before using a race-conscious remedy – construction of new housing in predominantly white areas of the city.

The mere fact that some of Petitioners' cases involved decrees that included both Section 8 housing and new construction in no way establishes that such decisions are in conflict with the decision below. None of Petitioners, cases invoked strict scrutiny as a basis for engaging in a balancing of race-conscious and race-neutral alternatives as more recent cases do. *See In Re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1545-49 (11th Cir. 1994).

Rule 10(a) of this Court's rules indicates that this Court will consider as a possible ground for granting a writ of Certiorari a decision in conflict with the decision of another United States Court of Appeals "on the same important matter." The cases Petitioners cite do not even discuss the matter of whether race-neutral Section 8 vouchers can be utilized as a means to remedy past discrimination in public housing before ordering new construction. The absence of any discussion of such an issue in Petitioners' cases may be due to the fact that, except for *Yonkers*, all of Petitioners' cases, pre-date this Court's decision in *United States v. Paradise*, 480 U.S. 149

(1987) which applied strict scrutiny analysis for the first time to judicial decrees.[4]

Moreover, *Yonkers* is easily distinguishable on its facts because *Yonkers* utilized a geographical rather than a race-conscious decree and involved no discussion of Section 8 vouchers as an alternative remedy to new construction.[5] Accordingly, the absence of any real or intolerable conflict on "the same important matter" and the ancient vintage of Petitioners' cases which predate intervening Supreme Court authority on the strict scrutiny requirement make any alleged conflict an insufficient ground for granting a Writ in this case. Rule 10; Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, p. 172 (7th Ed. 1993) ("A conflict with a decision which has been discredited or has lost all weight of authority by reason of intervening decisions of the Supreme Court . . . will not be an adequate basis for granting certiorari.").[6]

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[4] Three of Petitioners' cases, *Alschuler*, *Otero*, and *Shannon* are also distinguishable because they do not even involve remedial desegregation orders based on past racial discrimination, but only whether there was compliance with federal housing regulations.

[5] In *Yonkers*, the Court ordered the city to construct 200 units of family housing "outside of Southwest Yonkers." 837 F.2d at 1236-37. The only restriction on location of the new sites was thus purely geographic. There *was no racial component to the order*. There is likewise no indication in the opinion that the city ever suggested the use of Section 8 housing as an alternative to new construction.

[6] Furthermore, the factual circumstances of this case are very different from the factual circumstances in Petitioners' cases due to the extensive relocation of tenants required by the demolition of projects in West Dallas and the limitations on

III. THE FIFTH CIRCUIT'S DECISION DOES NOT PROHIBIT RACE-CONSCIOUS SITE SELECTION AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners argue that "the Fifth Circuit's decision prohibiting the use of race-conscious site selection conflicts with the decisions of this Court that require all remedies, race-conscious or race-neutral, fit the violation." Pet. at 13-14. However, Petitioners misread the Fifth Circuit's opinion.

The Fifth Circuit adopted no broad-based prohibition on race-conscious site selection. All the Court held was that "[b]ecause there are promising non-racially discriminatory ways to continue desegregating housing in Dallas . . . it is *premature* to utilize such a last resort measure [as race-conscious site selection]." (Emphasis added). App. 34. The Fifth Circuit also stated: "the District Court erred in employing a race-conscious remedy *before* utilizing race-neutral alternatives." (Emphasis added). App. 34-35. Clearly if the Fifth Circuit had intended any kind of blanket prohibition of race-conscious site selection, it would not have used terms like "premature" and "before" in describing the problem with a race-conscious remedy. If the race-neutral alternatives are not successful, the Fifth Circuit has not ruled out using race-conscious site selection at a later date.

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replacement housing imposed by the Relocation Act. Such important differences arising from differences in states of fact and not in the application of any principle of law is not a proper ground for granting a Writ of Certiorari. *See The Wisconsin Electric Co. v. The Dumore Co.*, 282 U.S. 813 (1931).

Petitioners nonetheless try to demonstrate a conflict with this Court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) on the alleged ground that the remedy in this case will not "fit" the violation. This argument, when closely examined, reveals no conflict with any legal principle in *Paradise* or any other decision of this Court.[7] Rather Petitioners' argument amounts to a disagreement over the application of well-established principles to the specific facts of this case. Ordinarily, that is not a proper ground for review by this Court.

Even on its own terms, however, the argument is unfounded. Petitioners argue that "race-neutral site-selection criteria will leave predominantly black and other minority-concentrated areas eligible for development of the already allocated public-housing units." Pet. at 14. But this argument is largely irrelevant because the *eligibility* for construction of new public housing in minority areas does not mean that such units will or are even likely to be built there. In *Yonkers*, the Court ordered construction "outside of Southwest Yonkers", a race-neutral criteria that made it theoretically possible that some construction could occur in minority areas. That possibility did not render the order constitutionally suspect.[8]

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[7] Petitioners cite, but do not claim any conflict with *Hills v. Gautreaux*, 425 U.S. 284 (1976). Pet. at 10. That decision was distinguished by the Fifth Circuit. App. 21, n.20.

[8] Petitioners' suggestion that "existing neighborhood and political opposition will continue to pressure DHA's decision on sites away from white areas and into minority areas", Pet. at 14, adds nothing to this argument. As the Fifth Circuit found, Plaintiffs, DHA and HUD, are now all "cooperating defendants." App. 28. There is no evidence in this record that

Furthermore, the persuasiveness of Petitioners' argument is not enhanced by their suggestion that under certain circumstances construction might occur in census tracts with a "non-Hispanic white population between 50% and 63%." Pet. at 14. In the real world such an area would be considered predominantly white and therefore suitable for integrated housing. However, under the district court's order predominantly white is defined as "less than 37% Hispanic, black or other minority," App. 8, or the equivalent of 63% white. Thus, while Petitioners are correct in suggesting that under the Fifth Circuit's order public housing could theoretically be built in areas with a 50% to 63% white population, it is hard to discern how that would harm the effort to desegregate public housing in Dallas or cause the remedy not to "fit" the violation. Furthermore, the Fifth Circuit found that "[T]here is no evidence in the record to support the Court's arbitrary definition of a predominantly white neighborhood" as 63% white. App. 32.

Petitioners' argument that the remedy doesn't fit the violation is also misguided because it focuses entirely on the 474 units of new construction in the district court's order as if that were the only legitimate method for desegregating public housing in Dallas. However, other alternatives including Section 8 housing offer superior means for accomplishing that end.

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absent an order requiring DHA to locate public housing only in white areas, that DHA will in fact place any appreciable number of units of new construction in minority areas. In fact, given the present DHA administration, the likelihood is just the opposite – most if not all units will be placed in white areas whenever HUD and DHA find the opportunity to do so.

This case is about people, not about any particular form of housing. There is no constitutional right "to dwellings of a particular quality," *Lindsay v. Normet*, 405 U.S. 56, 74 (1972), nor do municipalities have any constitutional duty to provide low-income housing. *Acevedo v. Nausau County, New York*, 500 F.2d 1078, 1080-81 (2d Cir. 1978). New construction is therefore not an entitlement that is owed to the victims of past housing discrimination. What they are entitled to receive is *integrated housing* whatever form it may take.

It is undisputed from this record that blacks can be moved into white areas of Dallas more rapidly, less expensively and with far less intrusiveness to adjacent property owners through Section 8 rent subsidies than through new construction. Between 1994 and 1996, the number of black families that had been moved into predominantly white areas of the city under the Section 8 program increased by 27%, App. 25, and the Fifth Circuit found that the record indicates that [the program] could be more successful with, for example, "increased funding for both more vouchers and the mobility program, more mobility counselors and higher fair market exception rents." App. 26-27.

Even more tellingly, the Fifth Circuit observed that the district court's own order relied overwhelmingly on Section 8 vouchers to achieve desegregation because 5,628 units or 92% of the units to be created under that order would be Section 8 units. As the Court of Appeals stated:

> If Section 8 can effectively satisfy the district court's remedial goal regarding 5,628 units, it is

> baffling to assume that it cannot do so for an additional 474 units.

App. 31. Because Petitioners never presented evidence sufficient to answer this question, the Fifth Circuit reversed that portion of the district court's order which required DHA to build 474 units of new construction in white areas of the city. App. 25. Petitioners have pointed to no evidence that would show that the Fifth Circuit abused its discretion in reaching this conclusion.[9]

Although Petitioners fail in their effort to show that the Section 8 remedy does not fit the violation, Petitioners fall back on the argument that a race-conscious, "predominantly white" remedial site-selection criteria "best" fits the violation in this case because "it is framed to address the exact effect and harm resulting from the predominantly minority site-selection criteria of the past." Pet. at 16. This argument is based on the concept of retributive justice, namely an eye for an eye; if the original wrong involved new construction, then new construction must be part of the remedy. However, this argument misperceives the nature of the wrong in this case.

The constitutional harm suffered by black tenants of public housing in Dallas has been to segregate them from whites, thereby denying them "the important benefits of

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[9] Petitioners also make the truly astounding argument that "Section 8 vouchers do not fit the public-housing violation." Pet. at 15. However, this argument, if true, would apply with equal force to 92% of the district court's own order, the terms of which Petitioners themselves negotiated. If Section 8 does not fit the violation, why have Petitioners accepted it for over 90% of the relief they sought in this case?

interracial association." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). While the benefits of interracial association were originally taken away by forcing blacks into public-housing projects in black areas of the city, *see Walker v. HUD*, 734 F.Supp. 1289, 1294-96 (N.D. Tex. 1989), forcing blacks today into housing projects in white areas of the city is not the only way or even the best way to remedy that wrong.

The history of housing projects in Dallas has been a dismal one. The West Dallas project referred to by various Courts as a "publicly-owned slum," *Walker v. HUD*, 734 F.Supp. at 1276, 1308, and as "one of Dallas' worst slums," *Walker v. HUD*, 912 F.2d at 821, consisted of 3500 Units, 1300 of which had been vacant and boarded up for at least ten years because they were not fit to be occupied by humans. *Walker v. HUD*, 734 F.Supp. at 1308. As a result, the district court required the demolition of approximately 2600 units of public housing in the West Dallas project. *See Walker v. HUD*, 912 F.2d at 819. *See also* App. 5. It was these units that were to be replaced on a one-for-one basis with additional public-housing units and with rental units subsidized by Section 8 certificates and vouchers. *See* App. 5.

Given these facts, there is no reason why the housing projects of the past need to be replaced with housing projects of the future and why the residents of Dallas, and these Homeowners in particular, must risk more housing projects turning into slums. Judges are not required to ignore the lessons of history. Because of the massive failure of public housing in the past, Congress in recent years has overwhelmingly favored rental subsidies over new construction in its appropriation of public-

housing funds.[10] That same preference is embodied in the Uniform Relocation and Real Property Acquisition Policies Act of 1990, 42 U.S.C. §§ 4601, 4626, et. seq. Moreover, it is undisputed that the majority of public-housing participants in this case prefer Section 8 housing over public-housing projects. App. 22. Even the district court itself in its decree overwhelmingly favored Section 8 housing to public-housing projects and agreed that Section 8 housing was more cost-efficient than new construction. App. 22. Unquestionably, Section 8 housing can accomplish racial integration more quickly than housing projects since the apartment units already exist and Section 8 rent subsidies are clearly less intrusive to adjacent property owners than the mortar and brick of new construction.

Public projects also have significant drawbacks that may be less pronounced in Section 8 housing. For example, housing projects where the residents are primarily of one race, often lead to resegregation within the projects themselves, *see Otero v. New York Housing Authority*, 484 F.2d 1122, 1132-36 (2d Cir. 1973), whereas Section 8 housing is more likely to contain fee-paying tenants of other races.

These and other reasons substantially undermine Petitioners' assertion that new construction "best" fits the

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[10] For example, as part of its 1997 budget, Congress appropriated over $9 billion ($9,000,000,000) for housing assistance programs, $8 billion ($8,000,000,000) of which is expressly allocated to "Section 8 subsidy contracts." 105 P.L. 65, 111 Stat. 1344 (1997). By contrast, Congress appropriated only $300 million dollars ($300,000,000) in the Hope VI statute under which DHA got its new construction funds in this case.

violations in this case. Because the benefits of interracial association can be fostered just as completely by Section 8 housing as by new construction, but without many of the disadvantages of new construction and without the use of explicit racial criteria, Petitioners' argument is not persuasive. Even if it were, however, the necessity for new construction was never established by sufficient evidence in the trial court. More importantly, none of these arguments demonstrate a conflict with any decision of this Court.

IV. THE FIFTH CIRCUIT DECISION CORRECTLY BALANCED THE RIGHTS OF THE COMPETING PARTIES IN ACCORDANCE WITH THE STANDARDS ESTABLISHED BY THIS COURT.

Petitioners argue that the Fifth Circuit's decision conflicts with this court's decision in *United States v. Paradise*, 480 U.S. 149 (1987) because it adopts a "new [and drastically lower] standard for impermissible impact on third parties . . . " Pet. at 18. There is simply no truth to this claim.

First, in articulating the standard for review in this case, the Fifth Circuit explicitly adopted the standard for reviewing race-conscious remedies set out in *United States v. Paradise*. App. 19. There is no statement anywhere in the Fifth Circuit's decision that it was following any different or lesser standard.

Second, there is no indication that the Court of Appeals gave any undue weight to that particular part of the *Paradise* standard that requires consideration of the impact of the remedy on the rights of innocent third

parties. If anything, the Court dealt with this factor rather perfunctorily. App. 33-34. A fair reading of the Fifth Circuit's decision quickly reveals that it was other factors in the *Paradise* test that played a far larger role in the balancing process undertaken by the Court of Appeals than did the impact on third parties. *Compare* App. 28-33 with 33-34.

Petitioners also incorrectly characterize the Fifth Circuit's decision as holding that the district court's "stringent measures" to prevent harm to adjacent homeowners "did not show narrow-tailoring". Pet. at 18. This is incorrect. The Fifth Circuit never concluded that the district court's efforts to prevent deterioration of the projects was not a factor in favor of narrow-tailoring. In fact, the Fifth Circuit was careful to note that "the district court showed considerable sensitivity to the fact that public housing has in the past been disgracefully neglected in Dallas." App. 33. However, the Court concluded that these safeguards cut two ways:

> On the one hand, it attempts to placate their fears of deterioration in their neighborhoods. On the other hand, it lends credibility to those fears.

App. 34.

In making this statement, the Court of Appeals was merely suggesting that the impact factor was fairly evenly balanced. However, it concluded that "because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, . . . under the balance of the *Paradise* factors, the criterion

[new construction] is not narrowly-tailored, and it is premature to utilize such a last resort measure." App. 34. The court thus gave no undue weight to the factor of third party impact, but rather assessed the need for new construction in relation to the availability of other remedies and found Petitioners' need for that remedy "premature" at this time. There was no error in the Fifth Circuit's methodology and no conflict with any decision of this Court.

Finally, the result reached by the Fifth Circuit, although different from the one reached in *Paradise*, is fully consistent with the rationale of that decision. In *Paradise*, this Court reviewed the constitutionality of a race-conscious order whereby the district court required that one black officer in the Alabama Department of Public Safety be promoted for every one white officer until the department had developed a promotion plan without adverse impact on black officers. In holding that such a one-to-one order was narrowly-tailored, this Court emphasized that the order was: (1) temporary in duration, (2) within the department's power to end, (3) limited in scope because it was only applicable in limited circumstances and (4) diffuse in impact because it only postponed promotions for whites rather than ending them. In light of the conclusion that the district court had no other effective remedy available to it, 480 U.S. at 177, this Court found that the promotion requirement "does not disproportionately harm the interests or unnecessarily trammel the rights of innocent individuals." 480 U.S. at 183.

The impact of the district court's order in this case is very different. First and perhaps most importantly, the

impact in this case is *not* temporary. As long as Homeowners live adjacent to public housing built pursuant to the district court's order, the value of their homes, the quality of their lives and their personal safety will be affected by any deterioration in or anti-social behavior from the public-housing projects.[11] One can debate endlessly the likelihood of these events occurring at the new sites or the sufficiency of the so-called "stringent" methods taken by the district court to prevent such deterioration (e.g., enforcement of city housing codes), but the extended duration of any impact on the Homeowners if the housing deteriorates is not debatable. It will last as long as they live in the neighborhood. As previously noted, large portions of the West Dallas projects were uninhabitable for ten years.

Second, Homeowners have little, if any, control over the impact that the public housing will have on their neighborhoods. If the public housing deteriorates, they can do no more than complain to the City of Dallas or hire attorneys to bring such issues to the attention of the district court. Therefore, unlike the defendants in *Paradise* who had the ability to end the race-conscious order by devising a constitutional promotion procedure, Homeowners have no such control. They are totally at the mercy of others.

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[11] *See Walker v. HUD*, 734 F.Supp. 1272, 1276 (N.D. Tex. 1989) (describing "the appalling conditions at West Dallas – housing that was barely fit to live in, almost 1300 units that were boarded up; severe problems with drug dealers, with other crimes, with transients, and with vandalism; health risks due to lead contamination; a bitter life with roaches and rats and rubbish."

Third, the impact of the district court's order is not limited in scope. The public housing is either built or not built. The only unknown is the extent of any impact that such construction will have on Homeowners in the future. However, the inability to quantify such impact and the possibility that it might grow in subsequent years only makes the potential impact more unlimited in scope.

Fourth, the impact on Homeowners will not be "diffuse" if the public housing deteriorates. One can debate whether this will occur, but the history of public housing in Dallas shows the possibility cannot be dismissed.

Finally, and perhaps most importantly, in this case there *is* an effective alternative. Section 8 housing has far less impact than new construction on neighborhoods and on adjacent homeowners because it utilizes existing apartments. The existence of this alternative affects the entire balance of hardships between the facts in this case and the facts in *Paradise*. Here the harm is "unnecessary" and "disproportional" because of the existence of a viable alternative that has not been given an adequate chance to accomplish desegregation.

Given the very significant differences between the nature, duration and scope of the impact of a race-conscious remedy in this case and in *Paradise*, there is no basis for the claim that the Fifth Circuit has "drastically lowered" the standard for impermissible impact on third parties set out in this court's decisions. What Petitioners are really quibbling about is the application of settled principles to specific facts. That is not a sufficient ground for review by this court.

V. THE FIFTH CIRCUIT DID NOT INTERFERE WITH THE SOUND DISCRETION OF THE TRIAL COURT.

In *U.S. v. Paradise*, 480 U.S. 149, 184 (1987), this Court recognized that "the choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." The Fifth Circuit expressly acknowledged this limitation, saying: "we are mindful of the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." App. 28. However, the Fifth Circuit noted that the district court's equitable powers "remain constrained by the boundaries of narrow-tailoring", App. 28, an approach consistent with the requirement that the district court's discretion must be exercised "within appropriate constitutional and statutory limits." *Paradise*, 480 U.S. at 184. In concluding that Petitioners had not provided sufficient evidence of the necessity for a race-conscious remedy at this time, the Fifth Circuit did not interfere with the district court's discretion as Petitioners suggest.

First, Petitioners' claim that the Fifth Circuit rebalanced the equities between the feared injury to adjacent property owners and the steps taken to prevent it when such equities had already been balanced by the district court. But a reading of Petitioners' references to the district court's decision show that the balancing

conducted by the district court was not the balancing required by the *Paradise* case.[12]

Under the *Paradise* case, the district court was required to assess the impact on third parties in terms of its duration, scope, diffuseness, and the degree of control given to the affected parties in proportion to the availability or other remedies. No balancing of this type was undertaken by the district court.[13] The Fifth Circuit could not therefore have interfered with the exercise of the district court's "sound discretion" within appropriate "constitutional and statutory limits" because no sound

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[12] What the district court did was balance the safeguards on the projects to be built in white areas with the lack of safeguards in the projects that had previously been built in black areas. App. 88-89; 174. Such balancing is a specific application of the discredited theory adopted by the district court that Homeowners would have no equal protection claim unless they could first identify a similarly situated set of black persons who have been treated better. App. 171. The Fifth Circuit specifically rejected this equal protection theory as an incorrect legal standard in this case because it applies only where there is no explicit use of racial criteria. App. 16. Since the district court's findings on this issue were based on a "mistaken impression of applicable legal principles, the reviewing court was not bound by the clearly erroneous standard". *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 855, n.15 (1982); *United States v. Bently-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993).

[13] The district court did find that the "impact on the Homeowners near the sites will be *comparatively* minimal and diffuse." App. 204. (emphasis added). However, the district court never gave reasons for this conclusion nor stated to what the impact was being compared. The only comparison that can be found is the comparison to the impact on blacks in black areas of the city which has no constitutional significance.

discretion within the appropriate constitutional limits was ever exercised.

Petitioners also argue that the district court provided a specific means to allow Section 8 vouchers to substitute for future allocations of public housing in white areas once the defendants could show that Section 8 would ensure housing in white areas. Pet. at 20. But the district court reversed the burden of producing evidence on this issue. It was Petitioners, not Homeowners, who had the burden to offer evidence showing that a race-conscious remedy like new construction in white areas of the city was necessary to achieve racial integration. App. 19-20. The Fifth Circuit correctly rejected the district court's misapplication of the burden of production and therefore owed no deference to any conclusion reached on that basis. App. 20.

Petitioners next complain that the Court of Appeals "ignored" the long record of neighborhood opposition to public housing in white areas. Pet. at 20. But Petitioners never explain how this opposition would have justified the use of new construction instead of Section 8 housing (certainly the opposition to new construction would be no less than opposition to use of Section 8 vouchers) nor do Petitioners explain how "ignoring" this fact interfered with the exercise of the district court's discretion.

Petitioners also complain that the Fifth Circuit overlooked findings that DHA historically segregated Hispanics by race. Pet. at 21. But Petitioners never explain how the district court's order which excludes Hispanics and "other minorities" from eligibility for public housing

in their areas will remedy any wrong against either Hispanics or Blacks. Similarly, Petitioners never explain why other minorities, e.g., Asians, are included in the district court's remedy when there are no findings of discrimination as to any other minorities. As the Fifth Circuit noted:

> This suit was brought by black plaintiffs on behalf of a class of black plaintiffs. There is no suggestion that the suit was ever expanded to include all minorities . . .

App. 32.

Finally, Petitioners contend that the Fifth Circuit incorrectly characterized the Section 8 voucher program as "race neutral", when the Section 8 mobility program that accompanied the successful movement of blacks into white areas "is explicitly race conscious." Pet. at 21-22. This argument is disingenuous.

The Section 8 program that successfully moved black families into white areas between 1994 and 1996, App. 25, is clearly race-neutral in terms of site-selection criteria. *See* App. 56, 91, 113 ("No Section 8 participant is denied the right to use the Section 8 assistance *in any areas.*") (emphasis added). Furthermore, as the district court noted, "There are no race-conscious limits on who gets Section 8 or any racial preferences for applicants of any race." App. 91.

The *only* aspect of Section 8 that is race-conscious is the mobility program. Mobility services are simply counseling services to help public-housing tenants find Section 8 housing. App. 6, n.6; 90-91. Blacks get counseling for use of Section 8 vouchers only when they are used in white areas. They do not get such services if they choose

to live in black areas "because there is no record that black Section 8 participants encounter any problem finding housing in minority areas." App. 91. Likewise, white participants do not get mobility services "because there is no record that white Section 8 participants encounter any problems finding housing in white areas." App. 91. Thus mobility services are tailored to those circumstances where they are shown to be needed.

The fact that race plays a minor role in the dispensing of counseling services in no way undermines the legitimacy of the Fifth Circuit's distinction between the race-conscious order to locate new construction in "white areas" and the race-neutral use of Section 8 vouchers which can be used in "any area." Thus, in terms of site selection, the remedy of new construction in the district court's order is clearly "race conscious" whereas the use of Section 8 vouchers is clearly "race neutral." The fact that there is a racial component to the counseling services is, from a legal perspective, irrelevant to the issues in this case.

Finally, Petitioners argue that the Fifth Circuit improperly limited the scope of the district court's discretion. Pet. at 19. In some cases this might be true. However, in this case it is most disingenuous to stress the exercise of the district court's sound discretion when the district court's entire Memorandum Opinion, App. 66-228, was copied verbatim (together with typographical errors) from Petitioners' Proposed Findings of Fact and Conclusions of Law. As the Fifth Circuit noted, the district court's opinion "[A]dopt[ed] the Walker plaintiffs' proposed findings of fact and conclusions of law *in toto*." App. 24. While there may be cases in which a Court of

Appeals has interfered with the sound discretion of a district court, this is not such a case. Indeed, this case would present a particularly poor vehicle through which to emphasize the deference to be accorded a district court's judgment when the trial court squandered most, if not all, of its discretion by ceding to Petitioners' counsel the difficult and delicate constitutional task of balancing the competing interests of the respective parties.

CONCLUSION

The Fifth Circuit properly reversed this case and remanded for further proceedings. That result was correct and presents no issue of sufficient importance to merit this Court's review. Petitioners' Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Attorney for Respondents

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLANDS OF McKAMI, et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 3-96CV1866-R
HOUSING AUTHORITY OF THE CITY OF DALLAS,	)	
Defendants.	)	

ORAL DEPOSITION OF ALPHONSO JACKSON
TAKEN ON AUGUST 29, 1996

REPORTED BY: Tina Young
Tina Young & Associates
7122 Jack Franzen
Corlana, Texas 75043
(214) 226-6365

* * *

[p. 8] PROCEEDINGS
MR. MELSHEIMER: Under the Rules.
ALPHONSO JACKSON,

having been first duly cautioned and sworn upon his oath to tell the truth, the whole truth, and nothing but the truth, testified as follows, to wit:

* * *

EXAMINATION

* * *

BY MR. MELSHEIMER:

Q. Mr. Jackson, would you please state your name for the record.

A. Alphonso Jackson, A-l-p-h-o-n-s-o, J-a-c-k-s-o-n.

Q. Mr. Jackson, my name is Tom Melsheimer. We met immediately prior to starting here today. And do you understand that I represent a group of homeowners who have filed suit in Judge Buchmeyer's court in a case that has been consolidated with the Walker case, and it's a case in which they're essentially challenging the construction of public housing in their neighborhoods. Are you familiar with that case?

A. Yes.

[p. 9] Q. You understand that's the case we're here take your deposition in today?

A. Yes.

Q. How are you currently employed?

A. I am the vice president of Corporate Resources for Central and Southwest Energy, an International Corporation.

Q. And how long have you held that position? I think it's only a couple of months, isn't it?

A. About five weeks.

Q. It's nice they would give you time off to come do this after five weeks, huh?

A. I didn't have a choice.

Q. Can I dispense with the normal admonitions with respect to a deposition? I assume you've had your deposition taken before?

A. Yes.

Q. And you understand that everything you say here is under oath, and is being taken down by a court reporter, just as if we were in court today?

A. Yes.

Q. And if I misstate anything or ask a question that you don't understand, would you

* * *

[p. 10] please feel free to correct me or ask me to clarify a question?

A. Yes.

Q. What was your job immediately prior to going to Central and Southwest?

A. I was the president and CEO of the Dallas Housing Authority.

Q. How long did you hold that position?

A. Approximately seven and a half years.

Q. When did you go to work for the Dallas Housing Authority?

A. January 1989.

Q. Did you go to work as the president and CEO?

A. At that time it was the executive director, but that's the equivalent.

Q. You had the same duties as executive director as you had as president and CEO?

A. Yes.

Q. Can you just describe for me briefly the duties and responsibilities of the president and CEO of the Dallas Housing Authority?

A. The responsibilities are -- is to manage the Housing Authority on a day-to-day basis, that is, to run the respective departments within the [p. 11] Housing Authority of the City of Dallas, housing, modernization, maintenance, client services, Section 8, et cetera, and to interface with the external community.

Q. Is it fair to say you were the boss of the Dallas Housing Authority?

A. I was responsible for all the activities of the Dallas Housing Authority.

Q. Anyone have any more responsibility than you?

A. No.

Q. Prior to coming to the Dallas Housing Authority in January of 1989, did you have any previous experience in the area of public housing?

A. Yes.

Q. What sort of experience did you have?

A. I was director of Housing for the District of Columbia and chair of the Redevelopment Authority.

Q. When did you hold that position?

A. From '87 to '89.

Q. Any other experience in public housing prior to DHA?

A. Yes, I was director of the St. Louis Housing Authority.

* * *

[p. 25] disbanded; and second, we would make every effort to disperse those certificates and vouchers to non-impacted areas in accordance with the consent decree; and that we would – we would do everything to maintain the buildings, the present conventional units, better than they had been maintained.

Q. Is it your understanding that there came time when the consent decree was vacated –

A. Yes.

Q. – or overturned?

A. Yes.

Q. What is your understanding of what led up to that?

A. I really can't remember.

Q. Okay. You understand that as a result of the vacation of the consent decree, that the Court entered a remedial order affecting DHA?

A. Yes.

Q. And that was in April of this year, or May of this year?

A. Yes.

Q. I want to ask you a little bit about the circumstances leading up to the remedial order. I'm sorry. I said May. It's February.

MR. WERNER: You got the year [p. 26] wrong.

MR. MELSHEIMER: And it's in February last year. I'm all messed up.

Q. (By Mr. Melsheimer) Just so we're clear on the record, you understand that the remedial order affecting DHA, which replaced effectively the consent decree, was issued by the Court in February of last year –

A. Yes.

Q. – '95? Let me show you what's been marked in a previous deposition as Exhibit 18. Do you recognize that as a true and correct copy of the Remedial Order Affecting DHA?

A. Yes.

Q. I want to focus your attention on that order, Mr. Jackson. Were there negotiations or conversations with the Plaintiffs that you participated in leading up to the entry of this order, Exhibit 18?

A. Yes.

Q. Can you describe for me the course of those conversations or negotiations?

A. Yes.

Q. When did they start?

A. I can't tell you exactly when they [p. 27] started.

Q. Was it sometime in 1994?

A. I – I can't specifically give you the date. I just don't know. I know it was about a year and a half before.

Q. Okay. So it could have been in late '93, but certainly in the late '93-'94 time period, you were involved in negotiations and conversations with the Plaintiffs with respect to what eventually became Exhibit 18?

A. Yes.

Q. Who participated in those negotiations?

A. Joe Werner, Mattye Jones, Lori Moon, Mike Daniels and his colleagues – I can't remember each – each person – Billy Daily, Bill Cerbone, Chris Wittmayer, Judge Buchmeyer, Special Master Louis Webber. I think that's – I think that's all.

Q. Can you summarize for me how – what you were negotiating about?

A. Sure. We were negotiating about how we – we would utilize the thirty-five hundred units or so that we had to replace with the demolition of Lakewest. You know it as West Dallas. And the negotiations started at whether [p. 28] we, from the Plaintiffs and Plaintiffs' attorney's position, whether we build thirty-five hundred units; or whether we bought thirty-five hundred units; or whether we used some section 8 certificates and some Section 8 vouchers; whether we had some conventional units built. It was trying to come down, because as I've said on a number of occasions, I didn't see how we could

build or buy thirty-five hundred units in North Dallas. So we started negotiating.

Q. The thirty-five hundred unit number, where did that come from?

A. I'm not sure.

Q. Was that a part of the – what the Court had ordered with respect to new units?

A. You know, I'm – I'm not – I think that it was – it was the replacement units to North Dallas from Lakewest, plus some new units. I'm just not as familiar as I used to be with it.

Q. I can certainly understand that. And I'll try not to refresh your recollection too much, because I'm sure your diminished one is far superior to mine. But in any event, can you summarize for me DHA's position in those negotiations? And if it changed, tell me that, [p. 29] too. But you've described a negotiation process over how these thirty-five hundred units were to be demolished. What was DHA's position with respect to those thirty-five hundred units?

A. Well, at first, our concern was: How do we replace them? Do we replace them – we replace some on that site? Do we build all of them outside of that site? Speaking for the agency, I just didn't think we could find thirty-five hundred units or build thirty-five hundred units in North Dallas.

Q. Why not?

A. I don't – I didn't think the land was there nor the units were there.

Q. By units being there, do you mean pre-existing units?

A. Pre-existing units with the size that we needed.

Q. And when you say "the size that you needed in pre-existing units," you mean the prospect of DHA buying a pre-existing building and converting that to public housing?

A. No. Whether there were apartment complexes or duplex complexes that could house two-, three-, four-, five-bedroom families. It was [p. 30] my perception that they didn't exist. We had two – we had had success with two bedrooms, but we had not had that kind of success with three, four, and five bedrooms.

Q. When you're talking about these thirty-five hundred units, are you talking about public housing replacement units and Section 8?

A. Our position was, is that we couldn't – I didn't believe, and I still don't believe, that we could have found or built thirty-five hundred conventional units. So, therefore, we sat down with the Plaintiffs and the Plaintiffs' attorney and tried to come to some agreement where some would be conventional units and some would be section 8 certificates and vouchers.

Q. So when you say the thirty-five hundred units was an unattainable number, you mean any combination of construction and Section 8 in North Dallas wasn't going to lead to thirty-five hundred units?

A. No. that's not what I said.

Q. Okay. Please –

A. I said when we started out, it was my understanding that the Plaintiffs and the Plaintiffs' attorneys wanted thirty-five hundred [p. 31] units. Those were conventional units. I felt that that was impossible –

MR. WERNER: Thirty-five hundred structures as opposed –

THE WITNESS: Thirty-five hundred structures.

MR. WERNER: – to some combination of structures and Section 8?

THE WITNESS: Right.

A. I felt that that was impossible to accomplish. So I asked our lawyer to permit us to – and the Court did, too – to negotiate with the Plaintiffs to try to have some mixture of both certificates, vouchers, and conventional housing.

Q. (By Mr. Melsheimer) I see. Just so I'm clear, the impossibility was that there wasn't going to be a way to find structures in North Dallas to house thirty-five hundred units of public housing?

A. To have structures or to build.

Q. Or to build the thirty-five hundred units. And, therefore, you, on behalf of DHA, sought to have that thirty-five hundred number comprise some new construction, some purchase of pre-existing structures, and some Section 8?

[p. 32] A. Yes.

Q. Other than your belief that there wasn't thirty-five hundred units in North Dallas –

MR. WERNER: That's not what he said.

Q. (By Mr. Melsheimer) Well, and let me try to get it straight. Other than your belief that there weren't thirty-five hundred – you weren't going to be able to accommodate thirty-five hundred units in North Dallas through the use of construction or buying pre-existing units, was there any other reason why you wanted to see that number comprised of new construction, pre-existing buildings, and Section 8?

A. Yes.

Q. What were those reasons?

A. The fair market rents. If we found houses in the communities that the agreed order of the consent decree or the – later the remedial order talked about, most of the time they are out of our FRM's – well, the fair market rent area. I mean, we're only allocated so much money that we can pay for a three-bedroom or four-bedroom or a five-bedroom. And so, therefore, if you have a four-bedroom going for two thousand dollars in that [p. 33] area, we can't afford to rent that apartment complex.

So my answer to that is, let's try to find a mixture of Section 8 certificates and vouchers, new construction, and buying. And hopefully in the process of buying, we would – we would be able to adequately accommodate the needs of the thirty-five hundred people.

Q. Did you have any policy considerations with respect to the new construction versus Section 8 that, for example, you thought that additional Section 8 would just be a better idea as a matter of policy, or was it all just a matter of availability?

A. Well, are you asking me my opinion?

Q. Yes.

A. Oh, I think Section 8 is excellent. There's no question that it's an excellent program. But the problem is, from a pragmatic point of view, you can't address the needs of the families that exist presently on our waiting list in the Housing Authority.

Q. Why is that?

A. Because we have three, four, and five bedrooms and the fair market rent does not equate

* * *

[p. 46] Q. You couldn't do all those units, in your judgment, in North Dallas under Section 8 because for the reasons that we discussed, they weren't available?

A. No. That's not what I said. I said that we had, between us, the Plaintiffs, and the Plaintiffs' attorney, experienced a spirited debate about what number would be conventional, what number would be Section 8. I understood clearly why the Plaintiffs and the Plaintiffs' attorneys was not going to let us have all Section 8 units. They felt that some of them should be replaced with conventional units.

Q. Was that based on your - did you understand them to want new construction because of they knew what you knew about Section 8 in North Dallas or some other reason?

A. I am convinced he's a very bright man. He knew the market was not there. In fact, he probably knows better than I do.

Q. The negotiations, then, were basically a negotiation between DHA, the involvement of the other parties and the Plaintiffs, with respect to how these thirty-five hundred units were going to be allocated?

[p. 47] A. That's correct.

Q. During the course of the negotiations, did you conduct any survey, like the housing opportunities survey, to determine how much of Section 8 could be borne in nonimpacted areas?

A. I honestly can't remember that. We might have. I don't know.

Q. Wouldn't that have been an important thing for you to know in terms of determining how much Section 8 could be used?

A. Oh, I think it's an important factor, but at the same time there were other factors. And the other factors to me, at that point, were more important. That is, to try to get an agreement with the Plaintiffs and the Plaintiffs' attorney. That was the most important thing to me, because I just did not believe that there was ample room to build or to buy thirty-five hundred units.

When I started out the process, if you asked me: "Did I have the data?" No. It was a gut feeling that they were not there. And I think it would have been a little premature on our part to talk about, "Yes, we can find land and build thirty-five hundred units or buy thirty-five hundred units."

* * *

[p. 48] Q. With respect to the Section 8 issue, though, and the availability of housing in nonimpacted areas, you don't know whether or not you did any kind of study during the negotiations as to what the availability was?

A. I just don't remember.

Q. We have been using North Dallas and nonimpacted areas sort interchangeably but, in fact, that's not the same thing, right? North Dallas and nonimpacted are not synonymous in the sense –

A. That's correct.

Q. – That there are areas that are nonimpacted that are outside of North Dallas, correct?

A. That's correct.

Q. Would your answers be the same concerning the availability of Section 8 housing in North Dallas, if we include North Dallas and all the nonimpacted areas, that there's just not – for the reasons you've stated, not enough, and when they are available, there's not enough money? We're talking about nonimpacted areas as a whole, including North Dallas.

A. If you're talking about the suburbs, I

* * *

[p. 50] A. People don't want public housing residents in their community.

Q. Excluding the suburbs, okay, nonimpacted areas, North Dallas, anywhere else in Dallas, your view that

there's not going to be sufficient – or let's go back to – let me strike that.

The process of the negotiation leading up to the remedial order in February of '95, it's your view that there simply were not enough units, for the reasons that you've stated, in nonimpacted areas to satisfy the thirty-five hundred allocation?

A. Well, there's a – there's a bit more that we're talking about with these units. There were some percentages that we agreed upon that had to be represented when we were talking about where the units would go in North Dallas. And I've forgotten that figure. I think it was – it has to be thirty-five percent or less African-American and Hispanic population. It had to be thirteen percent or less poverty. And so that relegated to where we would go, even though we had some nonimpacted areas that might be sixty percent. But in the agreement that we reached, they did not qualify areas where the four hundred and seventy-four units would [p. 51] go.

Q. Where did the numbers – with respect to poverty, crime rates, and percentage of African-American population, where did those numbers come from?

A. Census data.

Q. But where did the numbers that you agreed upon come from in the sense of what was the basis for choosing –

MR. WERNER: Why thirteen percent or why sixty-five percent?

A. Oh, I can't – I can't remember. I know. I just can't remember at this time. I know – I would have to refresh. I just don't remember.

Q. (By Mr. Melsheimer) Were those numbers that you proposed on behalf of DHA?

A. No.

Q. Were they numbers that the Plaintiff proposed?

A. Yes.

Q. Including all the requirements in the agreement with respect to poverty rates and percentage of African-Americans and crime rates, limiting it to those areas, it's your view that [p. 52] there simply weren't enough Section 8 units available for the reasons that you've stated?

A. For the reasons that I stated, and second of all, I thought that to get the Plaintiffs and the Plaintiffs' attorneys from thirty-five hundred units down to there, I – I really thought that they had given an awful lot. That's just my personal opinion; I thought they had given an awful lot. And I think to keep asking and asking and prolong the negotiation would have been frivolous because we might have been back up to thirty-five hundred units.

Q. I'm sorry. I think I missed you there. To get them down from thirty-five hundred units, down from what?

A. From thirty-five hundred units to basically four hundred and seventy-four units of conventional housing and the rest in certificates and vouchers – I'm sorry, with two hundred units being permitted to be in Lakewest. I think it's two hundred units.

Q. So in your view, the Plaintiffs had given in so significantly on the thirty-five hundred number down to four hundred and seventy-four new construction units, that it simply wasn't – you [p. 53] weren't going to get anything more out of this. Is that what you're saying?

A. I think they had given more than I expected to get out of them when we started negotiating.

Q. In this negotiation process, when you finally arrived at that four hundred and seventy-four number, did you make any assessment at that time whether four hundred and seventy-four units – let's put aside whether or not the Plaintiffs would agree to it, but whether or not four hundred and seventy-four units could have been accommodated through the Section – use of Section 8 in North Dallas?

A. That was a decision the Court had to make. We did the negotiation. We presented it to him, and it was clear from my perspective that we were not going to leave that negotiation without having some conventional units, period. I think the Plaintiffs and the Plaintiffs' attorney made that very clear, we had to have some conventional units.

Q. And I'm not trying to ask a hypothetical question. I am just trying to ask, did you do any analysis or study or determination at that time [p. 54] with respect to whether or not four hundred and seventy-four units could be accommodated through the use of Section 8?

A. But it is a hypothetical question. We started out the negotiation talking about thirty-five hundred conventional units. We knew in the beginning of that negotiation

that we were going to have some conventional units. We didn't know whether they were going to be four hundred and seventy-four, whether they were going to be five hundred, or whether they were to be a thousand. We knew we were going to have them. So to say that we did an analysis of whether this could have been converted to something else is absolutely of no value. We knew we were going to have conventional units.

Q. And because you knew that, you didn't do any such determination or study about Section 8. Is that a fair statement?

A. No, because we had Section 8 involved in that.

Q. I understand that, but with respect to whether or not the final four seventy-four could have been accommodated through the use of Section 8, you didn't do any determination as to [p. 55] whether or not that would – that could be used as Section 8 in North Dallas because you didn't think it made any sense to do it?

A. Didn't make any sense to do it.

Q. And you didn't do it?

A. No. It didn't make any sense. I think I made it clear to you that we started off with thirty-five hundred conventional units. We knew from the very beginning that the Court had said for us to get together and try to come up with an agreement that would be acceptable to the Court. It took us a year and a half to get there. And my position is, is that to get the Plaintiffs to agree to come down from where they were to where we were was absolutely surprising to me. Okay?

Q. Where did the thirty-five hundred number come from?

A. I can't remember. I still can't remember.

Q. Did that come from the Court?

A. I still can't remember.

Q. Did you ever give any consideration of going to the Court and – strike that.

Did DHA ever make a proposal to the Plaintiffs – in the year and a half of [p. 56] negotiations leading up to the '95 remedial order, did DHA ever make a proposal to the Plaintiffs or counterproposal that included no new construction?

A. No.

Q. Why not?

A. Because from my perspective, knowing what I know about the market, there was no way in the world we were going to find thirty-five hundred units in Section 8 certificates and vouchers. They're not there, not in the – not according to the guidelines that we set up, they're not in North Dallas.

Q. Or in any other nonimpacted area with the crime and minority population and poverty rate percentages as required?

A. I can't speak for the counties because – again, you're asking me to speak for the counties. I can't – I can't speak for them because we don't have the right to go there.

Q. Anywhere else in Dallas?

A. No. I mean, are you – yeah. There are other places. Yeah. We could have – we could have found thirty-five hundred certificates and vouchers in Dallas, but the bulk of them would have been in impacted areas.

[p. 57] Q. Did DHA ever make a proposal to the Plaintiffs that did not contain a racial component as to where the new units had to be located?

A. I'm sorry. You got me on that one.

Q. Well, it's hard to ask questions. Joe – it's easy for Joe because he's been in this seven years. I should –

MR. WERNER: Do you want me to ask them for you?

MR. MELSHEIMER: Well, actually I should, but it's going to be so embarrassing when it comes out in the record. Give me one more shot at it, then I'll see –

Q. (By Mr. Melsheimer) Did you ever propose to the Plaintiffs or to the Court a settlement solution in the Walker case that did not involve a race conscious site selection method; i.e., choosing the site where the housing would be built based on the population?

MR. WERNER: Without regard to the racial makeup of the neighborhood where the new project would go.

THE WITNESS: I'm still not sure what he's asking.

[p. 58] MR. WERNER: Do you want me to ask it?

MR. MELSHEIMER: Yeah. Try it.

MR. WERNER: He wants to know, did you ever give any consideration to putting new public housing construction in neighborhoods without regard to the racial makeup of the neighborhood where you put it?

A. No.

Q. (By Mr. Melsheimer) Why not?

A. Because we had an agreement, that became the remedial order, that said we would look at areas that were thirteen percent less poverty, thirty-five percent less African-American or Hispanic. And we knew where those areas were. That's the only guideline. It wasn't based on race. It was based on – on poverty and where there wasn't a concentration of African-Americans and Hispanics.

Q. Well, but that's a racial component, correct?

A. I don't think that's racial. I mean, I think that's – you can say it's racial. I think racial is building all of those developments in [p. 59] South Dallas. That was a conscious decision on the City part – part of the City.

Q. Well, we can say that's racial, too, can't we?

A. No, that is. That is.

MR. WERNER: May I?

MR. MELSHEIMER: Well, let me – I don't want to have you – I don't want you to bill my clients.

MR. WERNER: Oh, I'll promise you I won't bill them, depending on how the case turns out. I won't bill them for this question specifically.

MR. MELSHEIMER: I appreciate that, Joe.

MR. WERNER: I'll give you an offset.

Q. (By Mr. Melsheimer) The site selection process that DHA undertook for these new public housings has a racial component in terms of the neighborhood?

A. I'm not sure what you're asking.

Q. Well, you chose sites, looked for sites in areas that were predominantly white.

A. That's true. But African-Americans – [p. 60] African-Americans, Asians live in those areas, unlike South Dallas, where you won't find them.

Q. And I guess – I'm not trying to argue with you about the –

A. No, I'm not arguing. But I'm saying to you that –

Q. – the percentages. I'm just saying that you understood that DHA, in connection with the negotiations leading up to this remedial order, agreed to look for sites using a bunch of different criteria –

A. That's correct.

Q. – but that one of the criteria was that they would look for sites for new construction in areas that were predominantly white?

A. Yes. Correct.

Q. As a policy matter, based on your experience in public housing, do you believe that Section 8 is an overall more effective use of public housing dollars than construction of public housing?

MR. WERNER: The question is, is it more effective?

MR. MELSHEIMER: Yeah.

A. Yeah. That's a very difficult question.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	
	*	
v.	*	3:85-CV-1210-R
U.S. DEPARTMENT OF	*	CLASS ACTION
HOUSING AND URBAN	*	
DEVELOPMENT, ET AL.,	*	
	*	
and	*	
U.S. DEPARTMENT OF	*	
JUSTICE.	*	

PLAINTIFFS' MOTION TO MODIFY THE MODIFIED REMEDIAL ORDER AFFECTING HUD

Plaintiffs move the Court to modify the Modified Remedial Order Affecting HUD as set out below. The modifications are those made necessary by the 5th Circuit's recent opinion in *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999). The justification for each modification is set out below the modification and in the memorandum filed in support of this motion.

Proposed modifications to Modified Remedial Order Affecting HUD

Vestige A. same.

A.1. same.

A.2. replace with the following:

A.2.1. HUD shall use its discretion to accomplish the remedial goal of creating 3,130 units of family public

housing in sites that sites, units, projects, and neighborhoods which must provide housing opportunities and neighborhood conditions substantially equivalent to the sites, units, projects, and neighborhoods in and around the HUD assisted projects located in predominantly white areas in the Dallas Metropolitan area. These are the projects listed on the attached "HUD subsidized – non-public housing – Dallas and Collin Counties" list that are identified as located in "borderline" or "nonimpacted" locations. The units may not be located in census tract block groups where the poverty rate exceeds the average % of poverty for Dallas County under the most recent U.S. Census.

For purposes of this decree, "public housing" includes traditional low rent public housing, Section 8 project based housing assistance, or other forms of housing assistance which are unit based rather than tenant based and which provide housing on terms substantially equivalent to the terms on which traditional low rent public housing is available. "Public Housing" does not include tenant based Section 8 certificates or vouchers. "Predominantly white areas" has the meaning set out in ¶ A.6.2. of this order. "Area" means the geographic area within a quarter mile radius of the center point of the the [sic] proposed location of the project.

The number of units needed for a desegregated balance of opportunities was not reversed or affected by the 5th Circuit opinion.

The race conscious "predominantly white" provision is removed. The requirement that the conditions and

neighborhoods for the new public housing units be substantially equivalent to the conditions and neighborhoods of the HUD assisted projects located in predominantly white areas was also in the original order and was not reversed or affected by the 5th Circuit opinion. The present unequal neighborhood conditions between DHA's predominantly black projects and the predominantly white HUD assisted projects are one of the existing effects of the de jure segregation and must be addressed by the remedial order. The only race conscious element is in the identification of the neighborhoods where the HUD assisted projects which will be used as a standard for the site selection are located. This race consciousness is no more than that required when remedying any racial discrimination. Race must be taken into account even when coming up with a race-neutral remedy. The poverty criterion was not reversed by the 5th Circuit.

A.2.2. No site will be approved by HUD for any form of unit or project based DHA public housing without prior court approval under the standards set out in this order.

This provision ensures that any new sites for DHA project based assistance meet the remedial desegregation standards.

A.2.3. The sites for all additional public housing units, including those funded under the HUD HOPE VI program, and all additional units receiving any form of unit or project based assistance, including project based Section 8 assistance, shall comply with the same site selection standards as those contained in 24 CFR § 941.202.

The HUD site selection criteria were not challenged by the homeowners and were not overturned by the 5th Circuit. It is necessary to include the HUD criteria into the remedial order to prevent a conflict between the court order and the HUD criteria. Such a conflict could result from HUD refusing to approve a site that otherwise met remedial criteria but which did not meet the HUD site selection criteria

A.2.4. HUD shall implement these site and neighborhood standards and all of its housing development activities in a manner that will ensure the desegregated construction or acquisition of any new public or other forms of publicly assisted housing owned, operated, financed, or in any way assisted by DHA.

This language incorporates the 5th Circuit ruling that race-neutral criteria "will ensure the desegregated construction or acquisition of any new public housing."

A.2.5. Without prior court approval, HUD shall not approve any plan for DHA's sale, lease, encumbrance, or other transfer of any ownership interest in any property currently owned or leased by DHA or by any DHA affiliate or related corporation or other entity. This does not apply to the leasing of public housing or other low-income housing units to qualified tenants or to the sale of the Turnkey III units to qualified households. The standard for court approval is whether the proposed transaction is consistent with HUD's and DHA's constitutional duties to eradicate the effect of past segregation to the extent practical and to prevent future discrimination related to the past segregation.

This term is made necessary by the 5th Circuit's elimination of the race conscious site selection criteria. DHA owns several inner City located properties which because of demographic changes are in neighborhoods that are either becoming whiter or have the potential to become whiter. DHA also owns a few units that are in white areas. The race-neutral site selection criteria could result in the demolition and disposition of these sites and their replacement in minority areas which would further rather than eliminate the effects of past segregation. The provision ensures that any sale or other disposition of DHA property does not perpetuate racial segregation.

A.2.6. Without prior court approval. HUD shall not approve any plan for the demolition or removal from the inventory of subsidized public housing inventory of any DHA public housing unit. The standard for court approval is whether the proposed transaction is consistent with HUD's and DHA's constitutional duties to eradicate the effect of past segregation to the extent practical and to prevent future discrimination related to the past segregation.

This term is justified by the same reasoning as A.2.5. above.

A.2.7. With the exception of the 50 units of low rent public housing already used in the reconfiguration of the West Dallas project, HUD shall not approve the use in West Dallas of any of the 674 units of new public housing funding already allocated to DHA.

The use of race-neutral site selection criteria clearly leaves minority areas open for public housing development. The use of additional units in West Dallas would

make any balance of opportunities even more difficult. Under the previous decree, the use of race conscious criteria for most of the new units limited the impact of locating some of the units in the high poverty, minority concentrated West Dallas project.

A.2.8. HUD shall use its best efforts to ensure the complete development and full initial occupancy of the 549 remaining units of the 674 units of new public housing funding already allocated to DHA within two years of the date of this order. HUD shall use its best efforts to complete the development and achieve full occupancy of the total 3,130 units within 7 years of the date of this order. If these deadlines are not met, plaintiffs may apply to the Court for additional relief.

Funding for 335 of the existing allocation of new units was awarded in 1990 and 1991. The remaining units were allocated in 1994 under the West Dallas HOPE VI program. The delay of over a decade is too long. DHA is already in noncompliance with the time limits in the original order. These deadlines are necessary to secure the development of the units.

A.2.9. All units of public housing developed, acquired, or otherwise assisted by DHA shall be leased to tenants according to tenant selection and assignment procedures approved by the court. The tenant selection and assignment procedures shall afford African-American residents of and applicants for DHA's family public housing units the first and highest priority in occupancy for all newly developed units meeting the site and neighborhood standards in this order.

This provision ensures that the class members suffering from the existing effects of racial segregation are the ones first in line for any new desegregative housing opportunities developed under the race-neutral criteria.

A.2.10. HUD is permanently enjoined from approving sites for the location of housing units assisted through any form of DHA assistance for the purpose or which would have the effect of creating, maintaining, or perpetuating racial segregation in the housing receiving its assistance.

This provision simply states HUD's legal obligation to avoid future sites which would continue the previous violation of de jure racial segregation HUD's obligation is to ensure desegregation even if race-neutral criteria are being used.

A.2.11. HUD shall use its discretion to accomplish the remedial goal of this section as soon as possible consistent with the statutory mandates governing the allocation of HUD assistance. HUD shall also exercise its discretion under its various housing programs to create and develop housing alternatives in areas and neighborhoods in Dallas County, Texas and adjoining areas which will give African-American applicants for and participants in DHA's low income housing programs access to desegregated housing opportunities.

This the same as A.2 in the Modified Remedial Order Affecting HUD.

A.3. through A.5. the same.

A.6. renumber to A.6.1.

Add A.6.2. A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the proposed location of the unit. If the population, using the block level data for the most current U.S. Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area.

A.6.3. If a plan under this section is not approved and successfully implemented within 5 years from entry of this order, plaintiffs may apply for additional relief.

This will give HUD until 2004 to submit and implement a court approved Section 8 substitution plan. This plan is still race conscious because the 5th Circuit opinion cited to it as evidence that a race conscious public housing remedy was not needed. Since the 5th Circuit held the Section 8 substitution plan to be an acceptable alternative to race conscious site selection, then if it does not produce desegregated housing opportunities within a reasonable time, race conscious site selection should be reinstituted under the 5th circuit rationale of giving Section 8 a chance to produce desegregative results before adopting race conscious site selection criteria.

The 37% minority guideline is justified given the record in this case showing the use of Hispanic and other minority areas to keep public housing out of white areas.

A.7. eliminate.

The actions identified in this section are no longer available given the 5th Circuit's ruling on the use of the race conscious site selection criteria. The 5th Circuit has also required additional actions before the race conscious site selection can be considered.

A.8. same, renumbered to A.7.

A.9. same, renumbered to A.8.

Vestige B. same.

B.1. through B.9. same

Vestiage C. same.

C.1. through C.3. same.

C.4. HUD shall prepare and submit for Court approval a plan for vigorous DHA mobility program with more mobility counselors and increased funding by HUD that serves the relocation needs and concerns of black families, reaches out to white landlords, affords adequate fair market rent exceptions, and combats illegal private discrimination.[1] The plan shall include:

a. consideration of the use of publicly assisted multifamily housing such as low income housing tax credit recipients or other federal, state and local government

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[1] Landlords other than white landlords may used to obtain housing in predominantly white areas.

assisted low and moderate income housing programs that offer units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

b. reasonable modifications of the contracts, leases, and other forms used in the Section 8 program to encourage the participation of landlords with units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

c. reasonable modifications of the procedures used in the Section 8 program to encourage the participation of landlords with units in areas which will further the accomplishment of the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

d. regular communication between HUD, DHA and the other governmental and private entities enforcing fair housing laws on the identification of and elimination of illegal discrimination adversely affecting DHA's ability to accomplish the goals in ¶ C.2 of the Modified Remedial Order Affecting DHA.

e. actions to obtain or provide funding or other resources to eliminate other barriers to the accomplishment of the goals in ¶ C.2. of the Modified Remedial Order Affecting DHA such as the lack of child care, transportation, and high security deposits.

f. negotiations or consultations with landlords and landlord associations on issues such as income and employment requirements for tenants that limit section 8 participants' access to rental units. The negotiations or

consultations should focus on ways to serve any legitimate concerns of landlords while eliminating or reducing the barriers to Section 8 participants' access to rental units.

g. increased funding for both more vouchers and the mobility program, more mobility counselors, and higher fair market exception rents.

h. the goal of achieving and maintaining 65% of DHA's total Section 8 certificate and voucher allocation in predominantly white areas[2] of Dallas, the suburbs, and adjoining areas.

g. HUD's estimate of the costs of implementing DHA's Section 8 plan under C.6. of the Modified Remedial Order Affecting DHA, HUD's estimate of the costs of the HUD proposals for Section 8 under this order, the costs that can be paid for out of existing funding for the Section 8 program or other DHA funds, and identification of possible sources, including HUD funds, of funding for any costs which cannot be paid from existing sources and the steps necessary to obtain funding from those sources.

The plan shall be submitted within 60 days of the date DHA's plan is submitted to the Court. HUD shall implement the plan as approved or modified by the Court.

This provision reflects the 5th Circuit rulings that a Section 8 plan that is an alternative to a race conscious public housing site selection remedy must be vigorous.

[2] "Predominantly white" as defined in A.6.2. of this Order.

C.5. HUD shall determine whether or not fair market rent exceptions above 120% are foreclosed as a matter of law. If fair market rent exceptions above 120% are not foreclosed as a matter of law, HUD shall take all actions within its authority to implement the fair market rent exceptions above 120%. If fair market rent exceptions above 120% are foreclosed as a matter of law then HUD shall take all actions within its authority to fully implement 120% fair market exception rents. HUD's determination and actions may be reviewed by the Court on its own initiative or by motion of a party. HUD's determination and plans to implement the exception rents shall be made and provided to the Court and parties within 60 days of the date of this order. The plan shall be implemented in the form approved by the Court. HUD's actions to implement these exception rents shall be included in its reports to the Court and the parties.

This provision reflects one of the 5th circuit's preconditions for use of a race conscious public housing site selection remedy.

C.6. HUD shall prepare and submit a plan to the Court for the vigorous enforcement of federal laws prohibiting racial discrimination by private landlords who refuse to participate in DHA's Section 8 program. The plan shall be submitted to the Court within 60 days of the date of this order and shall be implemented by HUD as approved by the Court.

This provision reflects one of the 5th Circuit's preconditions for use of a race conscious public housing site selection remedy.

C.7. HUD shall prepare and submit a plan to the Court for increased funding for more Section 8 certificates and vouchers. The plan shall be submitted to the Court within 60 days of the date of this order and shall be implemented by HUD as approved by the Court.

This provision reflects one of the 5th Circuit's preconditions for use of a race conscious public housing site selection remedy.

Vestiage D. same.

D.1. same.

D.2. same.

E. [eliminate].

The 5th Circuit ruling has added actions which must be taken and which are not included in this section.

F.1. through F.3. same, renumbered to E.1. through E.3.

G.1. same, renumbered to F.1.

G.2. same, renumbered to F.2.

G.3. eliminate

The 5th Circuit ruling requires additional actions other than those in the Modified Remedial Order Affecting HUD. The ten year time frame in this section is no longer appropriate given the 5th Circuit's requirement that Section 8 and race-neutral site selection methods be implemented before a race conscious site selection remedy can be implemented.

G.4. same, renumbered to F.3.

G.5. through G.7. eliminate.

These provisions were based on the use of a remedy which included race conscious site selection and did not include many of the Section 8 program reforms ordered by the 5th Circuit. These provisions no longer fit the remedial obligations ordered by the 5th Circuit.

H. eliminate.

This provision is not consistent with the sweeping 5th Circuit ordered reforms to the Section 8 program and the other "helping hands" programs such as increased fair housing enforcement. While no funds can be spent in violation of the Congressional appropriations bills and statutory authorizations, there may be other funds within the discretionary control of HUD that could be used to comply with the mandates of the 5th Circuit.

I.1. eliminate.

I.2. eliminate.

These provisions were based on the agreement of plaintiffs and HUD to a remedial order that included the use of race conscious public housing site selection and that did not include the 5th Circuit mandated Section 8 reforms. The remedy revisions made necessary by the 5th Circuit ruling make these provisions inappropriate and inequitable to apply.

Respectfully Submitted,

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Attorneys for Plaintiffs

Certificate of conference

I certify that a written conference on the subject of this motion was held by sending a draft of the proposed relief to counsel for the defendants in this case. No agreement could be reached.

By: /s/ Michael M. Daniel
Michael M. Daniel
Laura B. Beshara

Certificate of Service

I certify that a true and correct copy of the above document was served upon counsel for all defendants by being placed in the U.S. mail, first class postage prepaid, and on counsel for HUD by Fed Ex delivery on July 8, 1999.

/s/ Michael M. Daniel
Michael M. Daniel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	§	3:85-CV-1210-R
VS.	§	CLASS ACTION
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE, ET AL.	§	

REMEDIAL ORDER AFFECTING HUD

(Filed April 16, 1996)

In its findings of fact and conclusions of law,[1] this Court found the U. S. Department of Housing and Urban Development ("HUD") liable for its role (and the role of its federal predecessor agencies) in perpetuating and maintaining racial segregation in DHA's low-income housing programs. In response, HUD has proposed various remedial actions and it has provided or allocated significant resources for a final remedial order. This has been done by HUD Secretary Henry G. Cisneros, though several different versions of *"the Cisneros Plan"* which were submitted to this court for approval. For example, the best Cisneros Plan – "devised to fulfill two policy

[1] See *Order* Regarding Facts Established By Class Plaintiffs' Motion For Partial Summary Judgment Against DHA and HUD (filed May 26, 1994) and *Order* Granting Motion For Partial Summary Judgment Against DHA and HUD On The Issue Of Liability To The Class For Injunctive Relief (filed May 27, 1994).

objectives to which [Secretary Cisneros] is strongly committed: (i) improving the quality of living conditions for residents of the Lakewest Developments [*the West Dallas Housing Project*]; and (ii) promoting desegregation in DHA programs" – offered, among other things, some $65.7 million and $1.5 million in HUD funding for these two critical needs.

In response to the plaintiffs' objections, HUD made substantial changes to the Cisneros Plan, but the plaintiffs and DHA still have some objections to that revised plan. Addressing those objections, *this final Remedial Order approves the Cisneros Plan,* but with certain modifications necessary to eliminate the vestiges of racial segregation in DHA's low income housing programs.[2]

> **Vestiage A:** 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[3] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit #79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit #79].

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[2] HUD's 9/27/94 exhibit #1 – Secretary Cisneros' Plan For The Revitalization Of The Lakewest Public Housing Developments And For Housing Assistance For The Dallas Metropolitan Area.

[3] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit #68 – excerpt from DHA monthly report].

HUD is ordered to take the following actions to eliminate this vestiage of racial segregation:

A.1. HUD shall provide one-for-one replacement units, as defined by law, for each of the 2,630 units demolished in DHA's West Dallas project before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. An additional 698 Section 8 vouchers will be provided by HUD,[4] and these will be one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved, then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.2. HUD shall use its discretion, within the framework of 42 U.S.C. 1439(d), to accomplish the remedial goal of creating a comparable number of units[5] in predominantly white areas as soon as possible consistent with the statutory mandates governing the allocation of

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[4] As provided in a plan to be submitted to this Court by HUD.

[5] See Remedial Order Affecting DHA, ¶ A.3 (Feb. 7, 1995).

HUD assistance. In determining the formula needed pursuant to 42 U.S.C. 1439(d), HUD shall include as an objective, measurable condition affecting the allocation of units, the number of units needed to eliminate the vestiges of racial segregation for purposes of the determinations made pursuant to 24 CFR 791.402(b). This obligation also applies to reallocations of funding. The desegregation factor does not substitute for the other indicators of need in the formula but is in addition to those indicators. HUD shall also exercise its discretion under its various housing programs to create and develop housing alternatives and in areas and neighborhoods in Dallas County, Texas and adjoining areas which will give the African-American applicants for and participants in DHA's low income housing programs access to desegregated housing opportunities.

A.3. HUD shall request that the City of Plano and each suburb in Dallas County, except for Grand Prairie and Wilmer, enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb.

A.4. HUD shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.[6]

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[6] Any cooperation agreements secured with Dallas County's assistance *should* be credited by HUD to Dallas County's obligation to affirmatively further fair housing.

A.5. If any suburb or Dallas County refuses to enter into cooperation agreements with DHA, HUD shall initiate an investigation to determine whether or not the refusal violates civil rights laws, HUD regulations, or other legal requirements.

A.6. Given the applicants' and residents' stated preference for Section 8 units, HUD is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at least part of the future allocations of new public housing in predominantly white areas. In order to be approved by the Court, HUD's plan must:

> a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and
>
> b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.7. HUD shall perform the following functions with regard to the other HUD Assisted Housing in Dallas County and Plano:

a. Modification of Affirmative Fair Housing Marketing Plans

HUD shall direct the owners, operators, or managers of assisted housing developments in Dallas County, Texas and Plano which are located in census tracts with a non-Hispanic white population equal to or greater than 60% according to the most recent U.S. Census to adopt or amend their existing Affirmative Fair Housing Marketing Plan or Equal Housing Opportunity Plan within 90 days of the date of this Decree to include the following procedures:

(i) Each assisted housing development will include DHA and the City of Dallas Fair Housing Office as community sources to be contacted for applicant referrals, and specifically will recruit as applicants those African-Americans referred to it by HUD, DHA, or the City of Dallas Fair Housing Office.

(ii) The owner, operator, or manager will record, for each African-American applicant, the dates each person applied, the action(s) taken on each such application and date of each action, the dates of each offer of housing assistance made, whether the offer(s) are accepted, the date of any rejected or withdrawn applications, and the specific reasons given by the applicant for any rejection of an offer or withdrawal of an application. On request and at least annually, the owner, operator, or manager will provide a status report that shows its current vacancies, its waiting list, each African-American applicant's place on this list, a listing of each unit by bedroom size that

was vacated and/or newly occupied since the initial directive from HUD or previous report, all applicants to whom offers were not extended and the reasons therefor, and a designation of offers and acceptances as to each such unit by applicant name, as well as making available the record itemized above.

(iii) Subject to federal preference percentage occupancy requirements, the developments will give African-American applicants referred by HUD, DHA, or the City of Dallas a preference, equal to, but no greater than, the federal selection preferences that are accorded in the recipient-selection process to other applicants who, at the time they are seeking housing assistance, fall in the categories listed in 24 C.F.R. § 960.211(a)(1) or in other applicable HUD federal preference regulations. All developments subject to this requirement, however, shall cease giving those persons the priority and preference required here if and when the African-American occupancy equals of exceeds the greater of (a) the percentage of the African-American population in need of subsidized housing in Dallas County, Texas and Plano, or (b) 75 percent. If the class member preference is no longer required, each class member will continue to receive the same statutory or regulatory federal preference to which the class member would otherwise be entitled.

(iv) The development will determine every three months, the racial composition characteristics of those receiving its assistance and the racial composition of those on

the waiting list for its assistance, and HUD will determine annually, the racial identification of the area of neighborhood within which those receiving its assistance are located.

b. Notice.

HUD shall provide annualy [sic] to DHA and the City of Dallas Fair Housing Office for distribution to each African-American participant in the low income housing program operated by DHA and the City annually, a written notice of all HUD-assisted low-income housing developments in Dallas County, Texas and Plano that would offer those persons a desegregative housing opportunity because it is located in an area that is at least 60% non-Hispanic white according to the most recent census information available. HUD shall provide to DHA and the City of Dallas for inclusion in the annual notice:

(i) The full address, telephone number, and name of the person responsible for accepting applications for the development, a short description of the type of housing offered by the development, and the general eligibility requirements for the development.

(ii) The notice shall also include: (a) a provision that informs the recipients that, upon request, HUD shall refer, in writing, the name of the person to specific developments; that the developments will be under a duty to recruit that person to apply; and specifically what this duty requires; and (b) the telephone number of the HUD Fair

Housing and Equal Opportunity ("FHEO") Office that is designated to perform the functions set out in paragraph d. below, and a brief description of the functions to be performed by that Office.

c. Response to Complaints

HUD's Southwest Fair Housing Enforcement Center shall respond to complaints of discrimination or of violations of HUD applicant-selection procedures or of the various civil rights statutes applicable to transactions conducted under this Decree. It shall keep written records of the complaints and of all actions taken by HUD as a result of the complaints.

d. HUD Functions

HUD shall perform the following functions:

i) HUD shall maintain a written record of all referrals to assisted housing developments and the results of such referrals, and shall monitor the performance of assisted housing providers in extending offers to persons so referred.

ii) HUD shall designate specific personnel to respond to requests for information and requests for assistance from African-Americans on the waiting lists for or participating in DHA's low income housing programs desiring to obtain a desegregative housing opportunity. The assistance to be provided shall include referrals of those interested to public housing developments, and to programs other than low income public developments, that offer desegregative

housing opportunities in Dallas County, Texas and Plano.

A.8. HUD shall submit to the Court, within 90 days of the date of this order, its assessment of the feasibility of, advantages and disadvantages of, likely cost of, and obstacles or barriers to the operation of a Clearinghouse for the Dallas metropolitan area. By "Clearinghouse" is meant the Clearinghouse concept as set out in attachment B to plaintiffs' 9/27/94 exhibit # 2. Depending on the results of HUD's assessment and the comments of the other parties to the lawsuit, the Court may order the operation of such a Clearinghouse.

Vestige B: The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62 – 66, 68 – 80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

HUD is ordered to take the following actions to eliminate this vestige of racial segregation:

B.1 HUD shall prepare and submit for court approval a schedule for funding and achieving the unit and project improvements necessary to make the unit and project conditions at DHA's projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas. The following improvements shall be included in the schedule as part of the improvements necessary for substantial equality:

a. Separate management staffs for each new public housing development built or acquired by DHA after February 7, 1995,[7] regardless of whether those management staffs exceed HUD unit-staff ratios.

b. Refrigerated air conditioning units in all public housing units and utility allowances sufficient to pay the entire actual cost of operation of these air conditioning units.

c. A DHA public safety division staffed by a DHA Assistant Director, whose sole responsibility is the organization and supervision of security patrols within each of DHA's public housing developments, and also staffed by off-duty officers of the Dallas Police Department under contract to DHA. Specifically, this DHA security division should provide not fewer than the following number of officers on duty at all times for the designated DHA public housing developments:

Lakewest Developments – no fewer than 10 officers.

Barbara Jordan Square – no fewer than 2 officers.

Frazier Courts – no fewer than 8 officers.

Rhoads Terrace – no fewer than 4 officers.

Turner Court – no fewer than 4 officers.

Town Park Apartments – no fewer than 2 officers.

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[7] I.e., the date of this Court's Remedial Order Affecting HUD.

Brackins Village – no fewer than 3 officers.

Cedar Springs Place – no fewer than 4 officers.

Little Mexico Village – no fewer than 2 officers.

Lakeland Manor – no fewer than 2 officers.

Park Manor – no fewer than 2 officers.

Brooks Manor – no fewer than 2 officers.

Forest Green Manor – no fewer than 2 officers.

Audelia Manor – no fewer than 2 officers.

Cliff Manor – no fewer than 2 officers.

Simpson Place – no fewer than 2 officers.

Oakland Apartments – no fewer than 2 officers.

All DHA scattered site housing units – no fewer than 2 officers.

d. Youth gang intervention programs conducted by qualified personnel at each DHA family public housing development.

e. Laundry facilities equipped with automatic clothes washers and dryers in all DHA low-rent public housing developments.

f. Landscaping and automated landscape irrigation systems at each of DHA's public housing developments.

g. Supervised after-school study and tutoring programs in each DHA family development for

all children of school age living in those developments, with the necessary buildings, furniture, equipment and supplies, including personal computers suitable for student use.

h. "Headstart" programs in each DHA family development for all preschool children, ages 3 years and older, living in those developments, with the necessary buildings, furniture, equipment and supplies.

i. At least two off-duty officers of the Dallas Police Department to patrol the Lakewest Shopping Center continuously between the hours of 8:00 a.m. and 10:00 p.m.

j. Video security surveillance systems, with tape recording capacity, to provide security surveillance of all points of ingress and egress if each DHA public housing building for senior and handicapped occupancy.

k. Resident-operated cooperative retail convenience and grocery stores at Turner Court, Frazier Courts and Rhoads Terrace, with the necessary facilities and management assistance.

l. Youth sports buildings, including facilities for basketball, boxing, strength training and similar athletic and recreational activities and programs, at Little Mexico Village, Cedar springs Place. Roseland Homes and Barbara Jordan Square, with the necessary equipment and staff to supervise youth athletic programs at those facilities.

m. Ceiling rents at the minimum level permitted by statute at all DHA public housing projects.

The schedule shall be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the sources of funding for each improvement. Priority shall be given to achieving the improvements in security necessary to achieve a safe environment within each project. The projects with the highest crime rate shall be given priority in the funding for the prevention of crime.

B.2 The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Any Comprehensive Grant Program funding which becomes available for reallocation because an agency does not qualify to receive all or a part of its formula allocation pursuant to 42 U.S.C. 14371(k)(6) shall be made available for these improvements in an amount equal to DHA's relative need as determined by 42 U.S.C. 14371(k)(2)(A). Future funding for these improvements may also become available under other programs created by Congress.

B.3 HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.109(d). The court order requiring DHA to remedy the constitutional and statutory violations of racial segregation is just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provisions of the operating subsidy for the vacant West Dallas units. HUD shall take the remedial needs imposed by this order into account when setting the operating subsidy for DHA. If the subsidy provided, in combination with other funding actually available to DHA, does not

allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4 HUD is ordered to catalog in writing all of HUD's grant programs and all of any other federal agency's grant programs which could be used to accomplish the improvements to the unit, project, and neighborhood conditions of the DHA family projects necessary to eliminate the vestiges of racial segregation. The catalog shall be completed within 30 days of the date of this order and shall be filed with the Court and served on the parties. The catalog shall be updated as old programs are abolished and new programs come into existence.

B.5 HUD is ordered to use its authority and leadership under Executive Order 12892 to convene a task force of representative of federal agencies with programs and funding which could be used to accomplish the improvements to the unit, project, and neighborhood conditions listed in B.7. below. The obvious examples of such agencies include EPA, Department of Education, Department of Health and Human Services, and the Department of Justice. HUD shall be responsible, using whatever assistance the task force may provide, for providing the timely identification of programs and funding to the local entity or entities eligible for such programs and funding and providing the technical assistance necessary to ensure that timely and complete applications, if necessary, are submitted and are given full and fair consideration by the agency involved.

B.6 HUD is ordered to use its authority to enforce the civil rights laws and the affirmatively further fair

housing provisions in the Fair Housing Act and the Community Development Block Grant Act to require the City of Dallas to affirmatively further fair housing by reducing crime in and around and blighting neighborhood conditions around DHA's family projects and achieving substantial equality to the conditions found in and around the predominantly white located HUD assisted projects in the Dallas area. The conditions which must be addressed include those listed in B.7. below.

B.7. In addition to high levels of crime, the other conditions adversely affecting all or some of DHA's family projects include:

a. exposure to industrial uses and environmental hazards,

b. inappropriate industrial zoning,

c. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

d. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

e. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

f. high concentrations of poverty households and households on public assistance, and

g. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.8. HUD shall submit a plan for achieving and maintaining substantial equality of conditions in and around DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

B.9. In considering any applications by the City of Dallas for HUD funds which could be used to eradicate the vestiges racial segregation in DHA's programs, HUD shall include as an objective, measurable condition affecting the allocation of assistance, the resources needed to eliminate the vestiges of racial segregation in DHA's low income housing programs.

> **Vestige C.** At least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

HUD is ordered to take the following actions to eliminate this vestige of racial secregation [sic]:

C.1. HUD shall provide DHA with $300,000 per year for ten years for the provision of mobility services to African-American applicants for DHA's low income housing programs.[8]

C.2. HUD shall take the need to eliminate Vestige C. into account in the setting and approval of Section 8 Fair Market Rent and Voucher Payment levels for Section 8

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[8] Housing mobility services shall be provided by DHA or, with the consent of the Court, by one or more third-party nonprofit organizations.

certificate and voucher programs operating in Dallas County and adjoining areas. If Fair Market Rent and voucher payment levels are adversely affecting the promotion of desegregation through the Section 8 program, and an increase in those levels is otherwise consistent with statutory requirements, HUD shall grant an exception to the Fair Market Rent level and approve an increase in the Voucher Payment Standard level necessary to obtain a desegregated housing opportunity in the Dallas County area and Plano.

C.3. HUD shall, as it has agreed, provide at least 1,000 Section 8 vouchers to the City of Dallas to be used by the City in complying with ¶3.5 of the City's 1990 Consent Decree with the plaintiffs.

> **Vestige D.** The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites received HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs' 9/27/94 exhibits ## 70 – 73, 76, 78].

HUD is ordered to take the following actions to eliminate this vestige of racial segregation:

D.1. The actions to eliminate Vestige C. above, which will also aid in the elimination of this vestige.

D.2. HUD shall also take the need to eliminate this vestige into account in its administration of the federal programs for housing and community development throughout Dallas County, Texas and the adjoining areas.

E. Monitoring and reporting

E.1. HUD shall file quarterly reports detailing the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall be filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. *The Court expects the parties to cooperate in the provision of information necessary to monitor compliance with this order.* However, if agreement is not possible on any matter, and if the Special Master is not able to resolve the duspute [sic], then the discovery provisions of the Federal Rules of Civil Procedure shall be applicable.

F. Jurisdiction of the Court

F.1. The court retains jurisdiction to enforce and modify this Remedial Order according to general equitable principles.

F.2. Ten years after entry of this order, the Court shall determine whether its jurisdiction over HUD shall be continued or terminated. The Court shall extend its jurisdiction over HUD if it determines that (i) HUD has not fulfilled the specific obligations to be performed as set forth in this order or, (ii) the DHA's low income housing programs have not been desegregated to the extent practical. If the Court extends its jurisdiction solely because of (i) above, its jurisdiction shall end upon fulfillment of those specific obligations. If the Court extends its jurisdiction because of (ii) above, such jurisdiction shall end at such time as the Court determines that DHA's low

income housing programs have been desegregated to the extent practical.

F.3. Should HUD choose to assert that unitary status has been achieved before the expiration of the ten year period, then HUD shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which HUD relies for the assertion that no further action to remove the vestiges of racial segregation is practical or required, whether or not actions by an organization, entity, or person other than HUD could further desegregation, what such actions are and the steps taken by HUD to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.4. Unitary status means that the [sic] all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's and HUD's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

F.5. HUD's acquiescence in the entry of this order shall not be taken as a waiver of any of its arguments based on principles of sovereign immunity.

F.6. The Secretary of HUD, the Assistant Secretary of HUD for Public and Indian Housing, and the Assistant

Secretary of HUD for Fair Housing and Equal Opportunity and their successors in office are personally responsible for compliance with this order pursuant to 5 U.S.C. § 702.

F.7. HUD shall have the right to object to those terms of the Remedial Order Affecting DHA (filed February 7, 1995) which impose obligations on HUD beyond the obligations provided in this Remedial Order Affecting HUD.

F.8. HUD's performance of its obligations under this Remedial Order will constitute full and complete relief for the violations admitted by HUD and found by the Court against HUD in this action.

ENTERED: APRIL 16, 1996

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	CIVIL ACTION NO. 3:85-CV-1210-R
v.	*	CLASS ACTION
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	*	
and	*	
U.S. DEPARTMENT OF JUSTICE	*	

REMEDIAL ORDER AFFECTING DHA

(Filed Feb. 7, 1995)

Vestige A. 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[1] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79].

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[1] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68 – excerpt from DHA monthly report].

DHA is ordered to take the following actions to eliminate this vestige:

A.1. demolish at least 2,630 units of the public housing in the West Dallas project.

A.2. provide one-for-one replacement units for each unit to be demolished before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. The additional 698 Section 8 vouchers promised in the HUD plan submitted to the Court are one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.3. Develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas. These units shall be in place and occupied before any non-family units or any units in non-predominantly white areas are developed. The restriction set out in the immediately preceding sentence does not apply to the use of public housing units in the reconfiguration of the West Dallas projects provided for in ¶ B.7. of this order. The site for each unit must be

approved by the Court and the units, projects, and neighborhoods for the units must provide housing opportunities substantially equivalent to the units, projects, and neighborhoods in and around the predominantly white located HUD assisted projects in Dallas County. The units may not be located in areas where the poverty rate exceeds 13%, the county average. The development of these units is dependent upon the provision of funding for public housing or comparable programs by HUD to DHA.

A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the center of the proposed location of the project. If the population, using the block level data for the most current US Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area. The relevant area for the determination of the poverty rate shall be the US Census census tract block group in which the site is located.

The already allocated 674 units of new public housing units shall be occupied within 3 years of the date of this order, or, if allocated for suburban development within 3 years and 6 months of the date of this order,

unless an extension is granted by the Court for good cause.

A.4. DHA shall make an application for public housing assistance at each available opportunity. All units allocated by HUD in the future shall be occupied within 3 years of the date of the allocation unless an extension is granted by the Court for good cause.

A.5. 350 of the currently available new public housing units and 50% of all subsequent allocations shall be tentatively reserved for use in predominantly white areas of the Dallas suburbs. DHA shall request that the suburbs enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb. If there are not enough suburban cooperation agreements signed or suburban sites available for acquisition within 6 months of the date of this order, then DHA shall develop the units in predominantly white areas of the City of Dallas. The three years for the initial occupancy of these units will begin to run after the expiration of 6 months form the date of the order.

A.6. DHA shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.

A.7. Given the applicants' and residents' stated preference for Section 8 units, DHA is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at

least part of the future allocations of new public housing in predominantly white areas. In order to be approved by the Court such a plan must:

a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and

b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.8. DHA may use a race conscious tenant selection method for the purposes of preventing or reducing racial identifiability if every person skipped over because of race is provided an equivalent [in terms of cost to the tenant, convenience and suitability for the family's individualized needs and location preferences] alternative housing opportunity. Before use, the method shall be submitted to the Court for approval. The race conscious tenant selection and assignment method should be used only in those instances where the desegregative benefit is substantial enough to justify the use of the resources for the alternative housing opportunities needed to achieve the benefit.

A.9. DHA may use a tenant selection and assignment method which maximizes applicant choice to the

extent the exercise of such choice does not unavoidably cause or maintain racially identifiable projects. For example, if there are 10 units in predominantly black projects available and the top ten applicants on the list are black, then the exercise of choice will not unavoidably cause or maintain racially identifiable projects. If there are 7 units in predominantly black projects and there units in a non-racially identifiable project and the top ten applicants 7 blacks and 3 whites, then the exercise of choice could cause or maintain racially identifiable projects depending on the preferences of the individual applicants.

A.10. Until another method is approved by the Court, DHA shall make the applicant with the oldest application date one offer which if refused results in placement at the bottom of the waiting list. If any appropriate units vacant at the time of the offer is located in an area or project where the applicant's race does not predominate, those units shall be offered to the applicant. Any offer to the West Dallas project may be refused by an African-American applicant and that applicant shall not lose her place on the waiting list. Any offer of a unit in a predominantly white project or location may be refused by a white applicant and that applicant shall not lose her place on the waiting list.

A.11. DHA shall ensure that each African-American household accepting a non-elderly, handicapped, or disabled designated public housing shall be placed on the Section 8 waiting list with an application date of the acceptance of the public housing. If the person accepting public housing is already on the Section 8 waiting list, then the application date is the actual application date.

Each African American household in a non-elderly, handicapped, or disabled designated public housing unit who is also on the Section 8 waiting list shall have a desegregated housing opportunity preference equal to a federal preference.

A.12. A racially identifiable minority public housing project has 75% or more non-Hispanic Black, Hispanic, or other minority total population. A racially identifiable white public housing project has 75% or more non-Hispanic white total population.

A.13. Propose and implement a plan, as approved by the Court, providing magnet project improvements for any family project located in minority racially concentrated areas for which there is not a substantial decline in racial identifiability within the three years after the unit, project, and neighborhood improvements required below are completed.

> **Vestige B.** The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62 – 66, 68 – 80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

DHA is ordered to take the following actions to eliminate this vestige:

B.1. Prepare and submit for court approval a schedule for achieving the unit and project improvements necessary to make the unit and project conditions at DHA's

projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas and including the improvements listed in paragraphs 32 – 35 on pages 23 – 25 and 38 – 46 on pages 26 – 27 of the DHA proposed permanent injunction for each DHA project. The schedule should be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the possible sources of funding for each improvement. Priority should be given to achieving the improvements in security necessary to achieve a safe environment within each project. The projects with the highest crime rate should be given priority in the funding for the prevention of crime.

B.2. The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Future funding may become available through other programs from local or federal agencies. DHA shall make application for all funding which could be used to address the inequalities affecting its public housing program. DHA's ability to achieve the improvements in B.2. is limited by the resources available, the need to maintain all of its units in decent, safe, and sanitary condition, and to comply with the statutory and regulatory requirements of DHA's low income housing programs.

B.3. HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.108(d). This order requiring a remedy for the constitutional and statutory violations of racial segregation is

just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provision of the operating subsidy for the vacant West Dallas units. DHA shall take the remedial needs imposed by this order into account when submitting its request for its operating subsidy from HUD. If the subsidy provided, in combination with other funding actually available to DHA, does not allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4. The neighborhood conditions around DHA's projects which must be addressed in order to achieve substantial equality with the conditions in and around the HUD assisted projects in predominantly white areas include those listed in B.5. below.

B.5. The conditions adversely affecting all or some of DHA's projects include:

a. high rates of crime,

b. exposure to industrial uses and environmental hazards,

c. inappropriate industrial zoning,

d. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

e. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

f. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

g. high concentrations of poverty households and households on public assistance, and

h. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.6. DHA's ability to affect these neighborhood conditions around the existing projects is limited to the operation of its own projects and to requesting actions by local and federal agencies and the private sector. DHA's plan for improvement of the neighborhood conditions shall include the determination of which agencies and institutions can improve the conditions and a request to those agencies and institutions for the actions which will improve the conditions.

B.7. In addition to the improvements listed for each DHA project, DHA shall implement a reconfiguration of and improvements to the West Dallas project units consistent with the concepts in the Lakewest Master Plan submitted to the Court under the following conditions:

a. no more than 950 units of public housing may remain in place after the configuration and improvements and this number shall be reduced by the number of City Consent Decree ¶ 3.5 units provided as part of the reconfiguration,

b. prior to the use of any new public housing units in the reconfiguration of the West Dallas project, DHA and plaintiffs shall seek the cooperation of the City of

Dallas in provision of up to 200 necessary infill units under ¶ 3.5 of the City Consent Decree in this case.

c. In the event that City Consent Decree ¶ 3.5 units are not available in time to be used in the reconfiguration of the first village no more than a total of 50 new public housing units may be used in the reconfiguration and improvements of that village,

d. In the event that no City Consent Decree ¶ 3.5 units become available for use in the reconfiguration of the West Dallas projects, no more than a total of 200 units of new public housing may be used in that reconfiguration. The use of these units shall not result in more than 950 public housing units remaining in place after the reconfiguration.

e. Plaintiffs are arguing for a provision in the order that would prohibit any reconfiguration or improvements to the West Dallas site "until the status of the RSR/Murmur site on the National Priorities List and any remedial efforts have been fully resolved." DHA opposes this language because "there is no evidence of any significant environmental health hazard to residents of DHA's West Dallas developments arising out of lead contamination connected with the RSR/Murmur site" and thus there should be no reason to delay the construction of improvements in West Dallas [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. This paragraph is the only paragraph in this order that has not been consented to by DHA [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. Therefore, the resolution of this issue will be set for a future hearing and resolution by the Court.

f. any construction, rehabilitation, excavation or other construction work will be done in compliance with all necessary safeguards against releases of hazardous substances,

g. DHA has requested a change in zoning to provide an adequate "buffer zone" between the industrial zoning and uses on Singleton Blvd. and the areas of the West Dallas project to be used for residential purposes.

h. the tenant selection and assignment plan shall provide that no applicant shall lose her or his place on the waiting list because a unit in the West Dallas project has been rejected,

i. the specific reconfiguration and improvements have been approved by the Court.

B.8. DHA shall submit a plan for achieving and maintaining substantial equality of conditions in DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

> **Vestige C.** At least 2,850 [59.2%] of the black house-holds on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

C.1. DHA's September, 1994 survey showed that at least 23% of those on the waiting list preferred housing in the suburbs, 27% preferred housing in North Dallas, and 11% preferred housing parts of Dallas "Other" than those listed [plaintiffs' 9/27/94 exhibit # 91].

C.2. DHA shall provide the mobility services to African-American applicants for DHA's low income housing programs and class members necessary to achieve and maintain a percentage of DHA's Section 8 allocation in predominantly white areas of the Dallas suburbs and a percentage of DHA's Section 8 allocation, including those in the suburbs, in predominantly white areas of North Dallas, predominantly white other parts of Dallas County, and predominantly white adjoining areas. The percentages shall be set after completion of another survey of the area preferences of DHA's applicants and participants. DHA and plaintiffs shall attempt to agree on the contractor for the survey and the content and procedure of the survey. In the event such agreement cannot be reached, the Court will determine any issues upon which there is no agreement.

The results of the survey shall be considered by DHA and the plaintiffs in their proposals for the target percentages for the mobility program. If agreement cannot be reached, the Court will set the target percentages. These percentages shall be achieved within four years of the date of the order setting the targets and maintained thereafter.

C.3. The mobility services provided shall include landlord recruitment, FMR and voucher payment levels, child care and transportation services, and Title VIII enforcement actions. The mobility services provided by DHA shall include the provision of neighborhood specific information on crime rates, objective indicators of school quality such TAAS results for the schools in the area,

social services, job training and employment opportunities, day care, medical facilities, neighborhood shopping services, transportation, and environmental hazards or other conditions inimical to family life.

C.4. DHA's ability to provide the mobility services and achieve the target percentages depends on the availability of funding for the provision of those services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, and the choices of the program participants. The need to avoid concentrations of assisted persons in individual locations shall also be taken into account in determining DHA's performance in achieving the target percentages.

C.5 DHA shall conduct quality control review inspections of at least 10% of all Section 8 EHP units within 90 days after the initial or annual Housing Quality Standards inspection and comply with all HUD HQS requirements.

> **Vestige D.** The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs' 9/27/94 exhibits ## 70 – 73, 76, 78].

D.1. DHA shall conduct perimeter inspections of all Section 8 EHP units at least twice annually, noting all obvious code violations on surrounding properties and reporting those violations to appropriate city code officials.

D.2. DHA shall monitor criminal activity, including criminal drug related activity, at and around all apartment projects in which 10 or more DHA Section 8 participants reside. A level of criminal activity at rates higher than the overall City of Dallas rates for any category of crime which level exists for more than six months shall be grounds for refusing to approve any additional section 8 contracts at that project and for relocating those Section 8 participants in residence.

E. Monitoring and reporting

E.1. DHA shall file quarterly reports detaining the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall be filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. DHA shall give Plaintiffs' counsel access upon request and upon reasonable terms to information and documents relevant to compliance with the decree.

F. Jurisdiction of the Court

F.1. The Court retains jurisdiction to enforce and modify this injunction according to general equitable principles.

F.2. Should DHA choose to assert that unitary status has been achieved, then DHA shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents

upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which the party relies for the assertion that no further action to remove the vestiges of racial segregation is practical or required, whether or not actions by an organization, entity, or person other than DHA could further desegregation, what such actions are and the steps taken by DHA to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.3. Unitary status means that the all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

7 Feb. 95
Date

/s/ Jerry Buchmayer
United States District Judge

Supreme Court, U.S.
FILED
DEC 17 1999
CLERK

No. 99-296

In The

Supreme Court of the United States

DEBRA WALKER, ET AL.,

Petitioners,

v.

CITY OF MESQUITE, TEXAS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MEMORANDUM OF RESPONDENT HOUSING AUTHORITY OF THE CITY OF DALLAS

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QUESTION PRESENTED

Whether an equal protection claim was stated in the absence of pleading or proof that any individual was subjected to special burdens or denied special benefits on account of his or her race?

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STATUTE

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 98 Mich. L. Rev. 245 (Nov. 1997) ...6, 7

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-35, is reported at 169 F.3d 973. The opinions of the district court, Pet. App. 36-65, 66-206, are unreported.

JURISDICTION

The court of appeals entered its judgment on March 16, 1999. Pet. App. 2. Petitions for rehearing were denied on May 19, 1999. Pet. App. 211. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Until this suit was filed, public housing in Dallas was *de jure* segregated by race. Pet. App. 40,[1] 41,[2] 73-81.[3] That segregation resulted in the exclusion of public housing from white neighborhoods. Pet. App. 69.[4] As a remedy for the systematic exclusion of public housing from white

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[1] Neighborhood groups (in 1950) opposed the construction of public housing because it contravened the "agreed line of demarcation between colored residents and white residents in the City of Dallas." Pet. App. 40.

[2] "DHA and the City felt an equally important need to keep blacks from moving into white areas [in 1950]." Pet. App. 41.

[3] "The director of DHA . . . specifically stated that the only place he would even consider putting the projects was 'in niggertown.' " Pet. App. 78-79.

[4] "The tragic racial discrimination of the past effectively built a fence behind which all public housing had to remain in minority neighborhoods." Pet. App. 69, n. 5.

neighborhoods, the district court ordered the construction of public housing projects in "predominantly white areas."[5] Pet. App. 214.

Attempting to comply with the district court's remedial order, the Housing Authority of the City of Dallas ("DHA") bought two tracts of unimproved land in a "predominantly white area" on which to build two small-scale housing developments. Pet. App. 67. When nearby homeowners learned that their new neighbors were to be public housing residents, they mobilized their neighborhood associations, the Highlands of McKamy IV and V Community Improvement Association and the Preston Highlands Homeowners' Association, Inc. The associations and two individuals (collectively, the "Homeowners") sued DHA to prevent the construction of public housing in their neighborhood. Pet. App. 67. The Homeowners alleged that they were being denied equal protection because the race of the majority of the residents of the area was one criterion for selecting the sites. Pet. App. 69.

The district court denied relief, Pet. App. 207-209, and the Homeowners appealed.

The court of appeals reversed, finding that the district court's remedial order was not narrowly tailored and therefore denied the Homeowners equal protection. Pet. App. 34.

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[5] A "predominantly white area" is defined as "less than 37% total non-Hispanic African-American, Hispanic, or other minority persons." Pet. App. 8.

ARGUMENT

The district court required DHA to build public housing in "predominantly white areas." Pet. App. 214. The Homeowners, who lived in "predominantly white" neighborhoods, contended that they were denied equal protection by the court's requirement to build public housing only in white areas, coupled with DHA's proposed construction of two 40-unit apartment complexes in their "predominantly white" neighborhood. Pet. App. 9, 69.

Although the Homeowners live in a "predominantly white area," Pet. App. 13, 69, no individual complained that he or she was denied equal protection because of his or her race. DHA App. 2, 3-7, 12-16. The Homeowners instead claimed that they were denied equal protection because almost all of the current residents of their neighborhoods were white. Pet. App. 69; DHA App. 31. No individual claimed that he or she personally was subjected to any burden or denied any benefit on account of his or her race, and none claimed to have been stereotyped or stigmatized because of his or her race – if the Homeowners were stigmatized, it was because their neighborhood was labeled "predominantly white."

The court of appeals concluded that the Homeowners were denied equal protection because the district court's remedy was not narrowly tailored. Pet. App. 34. The court of appeals reached that conclusion despite the absence of pleading or proof that any individual was discriminated against because of his or her race or because of his or her membership in an identifiable racial class. The decision of the court of appeals is contrary to

the traditional understanding of equal protection as a guarantee against the imposition of special burdens on account of the race *of the person burdened* and therefore conflicts with relevant decisions of this Court.

Racial classifications have been subjected to strict scrutiny and held unconstitutional because they treat people differently on account of their race, *Bush v. Vera*, 517 U.S. 952, 1008[6] (1996) (Stevens, J., dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227[7] (1995); *Fullilove v. Klutznick*, 448 U.S. 448, 523,[8] 525[9] (1980) (Stewart, J., dissenting), and because *de jure* segregation "emphatically implies the inferiority of one race." *Bush*, 517 U.S. at 1055 (Souter, J., dissenting); *see also Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).[10] Except perhaps

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[6] "Prior to Shaw I . . . we [applied strict scrutiny analysis] only in cases in which . . . discrimination harmed an individual or group of individuals because of *their* race." *Bush*, 517 U.S. at 1008 (Stevens, J., dissenting) (emphasis added).

[7] "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Adarand*, 515 U.S. at 227 (emphasis added).

[8] "Under our Constitution, any official action that treats a person differently on account of *his* race or ethnic origin is inherently suspect and presumptively invalid." *Fullilove*, 448 U.S. at 523 (emphasis added).

[9] "Under our Constitution, the government may never act to the detriment of a person solely because of *that person's* race." *Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting) (emphasis added).

[10] "To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community." *Brown*, 347 U.S. at 494.

in the racial gerrymander cases,[11] the Court has never extended the guarantees of the equal protection clause to individuals who claim to be injured on account of someone else's race and, accordingly, has rejected equal protection challenges brought by individuals who were not injured because of their own race or color. *United States v. Hays*, 515 U.S. 737, 744-745 (1995); *Bush*, 517 U.S. at 957. The decision of the court of appeals nevertheless purports to require strict scrutiny of a desegregation order that may affect geographical areas populated "predominantly," but not exclusively, by non-Hispanic whites without a showing that any individual was adversely affected on account of *his or her* race. The court of appeals, at the same time, purported to extend equal protection standing to individuals who did not allege that they personally were subjected to burdens or denied benefits on account of *their own* race, contrary to this Court's decisions in *Hays*, 515 U.S. at 744-745 and *Bush*, 517 U.S. at 957.

Until *Shaw v. Reno*, 509 U.S. 639 (1993), the Court apparently applied strict scrutiny analysis to racial classifications only when they "harmed an individual or set of individuals because of their race," *Bush*, 517 U.S. at 1008 (Stevens, J., dissenting), and required evidence of substantial harm to an "identifiable group." *Bush*, 517 U.S. at 1050, 1053-1054 (Souter, J., dissenting); *Shaw v. Hunt*, 517

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[11] *Lawyer v. Justice*, 521 U.S. 567 (1997); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Reno*, 509 U.S. 639 (1993).

U.S. 899, 923-925, 928 (1996) (Stevens, J., dissenting). The Court's pre-Shaw decisions were based on the "very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment." *Bush*, 517 U.S. at 1053 (Souter, J., dissenting); *see also* Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 98 Mich. L. Rev. 245 (Nov. 1997).[12]

The requirement to build public housing in "predominantly white areas" manifestly does not classify any individual on account of his or her skin color, does not treat any individual differently on account of his or her race,[13] does not perpetuate archaic and stereotypic notions or stigmatize any individual as innately inferior, and does not deny any individual equal treatment solely because of his or her membership in an identifiable racial group, unless it can be said that the residents of "predominantly white areas," regardless of the race of any individual, are a racially identifiable group. The requirement to build public housing only in "predominantly white areas" plainly does not stigmatize the Homeowners

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[12] "In the racial gerrymandering cases, the Court has confronted state action that, though undeniably race-conscious, does not appear to single out any identifiable group of persons for special disadvantage *because of their race*." Saunders, *supra*, 98 Mich. L. Rev. at 245 (emphasis added).

[13] "Predominantly white area" is defined as an area in which the population is "less than 37% total non-Hispanic African-American, Hispanic, or other minority persons." Pet. App. 8. Areas with a 36% minority population therefore could qualify as "predominantly white", and residents of all races, white or minority, would be affected equally by the construction of public housing.

by implying that they are racially inferior. The requirement to build new public housing only in "predominantly white areas," if racially discriminatory at all, is " 'discrimination' only in the sense that the lines [of those areas] are drawn based on race, not in the sense that harm is imposed on specific persons on account of their race." *Bush*, 517 U.S. at 1008 (Stevens, J., dissenting).

The court of appeals purported to require strict scrutiny of a desegregation remedy that the court views as discriminatory because, citing *Shaw v. Reno*, "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition." Pet. App. 16-17. The court of appeals concluded that the district court's remedial order "distinguishes between individuals" and therefore is subject to strict scrutiny without requiring a showing that any individual was subjected to special burdens or was stigmatized on account of his or her race. That decision of the court of appeals conflicts with decisions of this Court that limit strict scrutiny analysis to the unequal treatment of individuals who, because of *their* race, are subjected to special burdens, denied special benefits, or stigmatized, and is contrary to the "very understanding of equal protection" because the remedial order, "though undeniably race-conscious, does not appear to single out any identifiable group of persons for special disadvantage *because of their race*." Saunders, *supra*, 98 Mich. L. Rev. at 245 (emphasis added).

CONCLUSION AND PRAYER

The court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court, and the petition for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLANDS OF McKAMY IV AND V COMMUNITY IMPROVEMENT ASSOC., GINGER LEE, PRESTON HIGHLANDS HOMEOWNERS' ASSOC., INC. AND DAVID BEER	§	
Plaintiffs,	§	Civil Action No. 3-96-CV-1866-R
vs.	§	
HOUSING AUTHORITY FOR THE CITY OF DALLAS,	§	
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT
AND REQUEST FOR INJUNCTIVE RELIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Plaintiffs Highlands of McKamy IV and V Community Improvement Assoc., Ginger Lee, Preston Highlands Homeowners' Assoc., Inc., and David Beer file this their Original Complaint and Request for Injunctive Relief[1] and would respectfully show the Court as follows:

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[1] Because this lawsuit is related to remedial orders entered in *Walker v. United States Dept. of Housing Urban Development*, Cause No. 3-85-1210-R, pending in the Northern District of Texas. Plaintiffs' request that this court consolidate this lawsuit with the *Walker* case.

I.

Parties

1. Plaintiff Highlands of McKamy IV and V Community Improvement Association ("Highlands of McKamy") is a non-profit corporation organized under the laws of the state of Texas. Highlands of McKamy is a homeowners' association that represents approximately 247 households in Dallas, Texas.

2. Plaintiff Ginger Lee is an individual who resides in Dallas, Texas.

3. Plaintiff Preston Highlands Homeowners' Association, Inc. ("Preston Highlands") is a non-profit corporation organized under the laws of the state of Texas. Preston Highlands is a homeowners' association that represents approximately 673 households in Dallas, Texas.

4. Plaintiff David Beer is an individual who resides in Dallas, Texas.

5. Defendant Housing Authority for the City of Dallas ("DHA") is a governmental body established on or about March 11, 1939, by resolution of the Dallas City Council. DHA may be served with process by and through its president. Alphonso Jackson, as its principal place of business at 3939 North Hampton Road, Dallas, Texas 75212.

II.

Jurisdiction and Venue

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that Plaintiffs' claims arise under the Constitution, laws, or treaties of the United States. Specifically, Plaintiffs' claims against Defendant relate to the violation of Plaintiffs' rights under the 14th Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983.

7. Venue is proper pursuant to 28 U.S.C. § 1391(b) because this action is not founded solely on diversity of citizenship, and (a) this is the judicial district in which the sole Defendant resides, and (b) a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

III.

Background Facts

A. The Walker Case.

8. In 1985, Plaintiff Debra Walker filed a lawsuit against the Housing Authority for the county of Dallas ("DHA"), Cause No. 3-85-1210-R which remains pending in the Northern District of Texas (hereinafter the "Walker Case"). In the Walker Case, Walker alleged claims on her individual behalf, as well as a class of "all black persons who are presently or who, during the pendency of this Decree, become either (a) residents of a DHA owned or managed project, or (b) participants in the DHA Section 8 Existing Housing Program." *See Walker v. United States Department of Housing and Urban Development*, 734 F. Supp.

at 1232, n. 1 (N.D. Tex. 1989) (hereinafter "Walker I"). In addition to the plaintiff class and DHA, the other parties include the United States Department of Housing & Urban Development ("HUD") and the City of Dallas.[2]

9. The plaintiff class in the Walker Case alleged that DHA and HUD maintained intra-program segregation within DHA's programs by assigning white elderly tenants to predominantly white projects and black elderly tenants to predominantly black projects. In addition, the plaintiff class alleged that the defendants engaged in racial segregation by operating DHA's programs in a manner that presents black recipients of HUD/DHA assistance only with the choice of predominantly black housing in predominantly black areas for the purpose of perpetuating racial residential segregation. *Walker v. United States Department of Housing and Urban Development*, 734 F.Supp. at 1266 (N.D. Tex. 1989) (hereinafter "Walker II"). In particular, minority families living in the housing project known colloquially as the "West Dallas Housing Project" complained that DHA, HUD, and the City of Dallas had discriminated against blacks in site selection by refusing to locate new housing projects in predominantly white areas of the City, and later by being

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[2] When the case was originally filed, the Plaintiffs also sued the cities of Plano, Richardson, Mesquite, Irving, Addison, Garland, and Farmers Branch. However, these cities were dismissed from the lawsuit when they agreed to participate in the Section 8 program. *See* Walker I, 734 F. Supp. 1233 and n. 6.

denied full participation in DHA's Section 8 Existing Housing Program.[3]

10. The parties to the Walker Case negotiated a consent decree pursuant to which the Court then entered findings of discrimination on the part of DHA and HUD (the "Consent Decree"). In this regard, most of the findings, issues, and relief ordered in the Walker Case were *not* the result of contested litigation among the parties. Indeed, this characteristic of the Walker Case was recently recognized by one of the parties to the Walker Case:

> The remedial obligations contained in the Order, other than those which were also contained in the Cisneros Plan, were first presented to HUD as part of a settlement proposal on October 24, 1995. Ex. 1. They were not the subject of the September 1994 hearing, where Plaintiff offered only documentary (or "predicate") evidence on the continued existence of vestiges of *de jure* segregation. As a consequence, HUD has not been afforded an opportunity to contest these provisions in an adversarial proceeding.

HUD's Motion to Modify Remedial Order Affecting HUD, p. 17 (May 24, 1996).

11. In approving the Consent Decree, the Court found a long history of discrimination by the DHA against blacks in locating public housing in minority areas. Specifically, the Court found discrimination against

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[3] The Section 8 program was designed to desegregate the racially identifiable Dallas projects through the use of certificates and vouchers. *See* 42 USC § 1437f (b and o).

blacks in the selection of sites for public housing. *See Walker v. United States Department of Housing and Urban Development*, 734 F. Supp. at 1293-1309 (N.D. Tex. 1989) (hereinafter "Walker III"). Moreover, the Court found that the City of Dallas had been a substantial cause of that discrimination. *Id.* at 1309-1312. The Court also found that the West Dallas Housing Project, which had been constructed in the 1950's, and which consisted of some 3,500 units on three separate sites, was plagued by deplorable conditions, including high crime rates: exposure to industrial uses and environmental hazards; inappropriate industrial zoning, unsatisfactory streets, curbs, draining, sidewalks, and lighting, lack of neighborhood commercial services such as grocery stores, pharmacies, and banks; lack of decent, affordable housing around the projects: high concentrations of poverty; and public schools challenged by a high percentage of students failing to pass minimum competency tests. *Id.* at 1266-1269.

12. To alleviate these conditions, including the history of past discrimination, the Consent Decree obligated DHA to develop and submit to HUD for approval a comprehensive plan for revitalizing the West Dallas Project. The plan that was developed by DHA recommended modernizing 800-900 units and demolishing the remaining 2,600 units over a period of five years. This demolition at West Dallas would be completed with the issuance of a like number of Section 8 vouchers and certificates to enable residents to relocate to predominantly white areas of Dallas.

13. The Consent Decree did not require HUD or DHA to provide the fiscal resources necessary to accomplish the demolition and replacement, and those

resources were not forthcoming during the pendency of the decree. The lack of those resources frustrated the remedial relief set forth in the Consent Decree. Accordingly, the Court vacated the Consent Decree in 1992.

14. Thereafter, the plaintiff class filed a Motion for Partial Summary Judgment against DHA and HUD seeking judgment on the issue of liability. This Motion was granted on May 27, 1994. Subsequently, the Court heard evidence concerning a renewed request for remedial relief against DHA and HUD. On February 7, 1995, the court entered its Remedial Order Affecting DHA. Thereafter, on April 16, 1996, the Court entered its Remedial Order Affecting HUD.

B. The Remedial Order Affecting DHA.

15. The Remedial Order Affecting DHA set forth findings of four distinct "vestiges" of discrimination, along with specific remedial measures to be accomplished by DHA. Specifically, the Court, *inter alia*, ordered the following remedial measures:

(1) The demolition of at least 2,630 units of public housing in the West Dallas Project;

(2) The requirement that each unit to be demolished be replaced on a one-for-one basis. Such replacement units are to consist of 100 public housing units already constructed at the Country Creek Site. 674

public housing units to be constructed,[4] and 2,033 Section 8 certificates and vouchers.

(3) The development through construction or acquisition of an additional 3,205 public housing units in predominantly white areas.

Remedial Order Affecting DHA at 1-2. In addition, the Court ordered DHA to adopt a race-conscious tenant selection program in order to maximize the opportunity to relocate blacks to predominantly white areas. *Id.* at 5.

C. DHA's Implementation

16. Pursuant to the Remedial Order, on or about April 26, 1996, DHA announced its intention to purchase two property sites for the purpose of constructing public housing. These two sites are located at (1) McCallum Boulevard and Meandering Way and (2) Highway 190 and Hillcrest Road, as evidenced by Exhibits "A" and "B", respectively (the "Sites"). These Sites lie in close proximity to Plaintiffs' homes and communities.

17. Following this announcement, DHA convened two public meetings, as required under the Texas Open

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[4] Notwithstanding this Order, DHA has repeatedly made public statements to the effect that it is required by the decree in the Walker Case to construct only 474 units of public housing in predominantly white areas of Dallas. This difference in the number of units to be constructed is not material to any claim alleged by Plaintiffs. Regardless of the precise number, DHA has announced an intention to build public housing in close proximity to Plaintiffs pursuant to the mandates of the Remedial Order Affecting DHA in the Walker Case.

Meetings Act which meetings occurred on June 19 and 20, 1996. Although a number of problems with the Sites became evidence at these open meetings, DHA remains committed to acquiring both Sites for the purpose of constructing public housing, as mandated by the Remedial Order Affecting DHA. In fact, on July 2, 1996, DHA voted in favor of acquiring the Sites for the purpose of constructing public housing on them.

18. Upon information and belief, DHA is currently scheduled to close on the acquisition of the Sites in July 1996. Once DHA closes on the property, DHA intends to begin constructing approximately 40 units of public housing on each of the Sites. Tenants for these public housing units will then be selected pursuant to a race-conscious tenant selection method.

19. DHA's implementation of the Remedial Order Affecting DHA constitutes a "race-conscious" remedy that is subject to the "strict scrutiny" test under the federal constitution. Pursuant to the Remedial Order, DHA has selected the Sites primarily, if not solely, by virtue of the fact that they are located in "predominantly white areas," which the Court defined as an area in which the population "is less the 37% total non-Hispanic. African-American Hispanic, or other minority persons." *See* Remedial Order Affecting DHA at 3 (¶ A.3). In addition, DHA will select tenants for these newly constructed units pursuant to a "race-conscious tenant section method," as mandated by the Remedial Order. *See id.* at 5 (¶ A.8). Such a race conscious tenant selection method will give preference to those applicants who locate in units where the applicants' race does not predominate.

20. In implementing the Court's race conscious Remedial Order, DHA did not attempt to offer evidence of any alternate method(s) to remedy the vestiges of discrimination. Consequently, the Court did not evaluate whether other, less intrusive means were available as an alternative to the requirement that DHA construct new public housing units.

21. Similarly, DHA has not attempted to challenge the Remedial Order on the ground that such order is not narrowly tailored, nor the least intrusive means by which to remedy the vestiges of discrimination. Instead, DHA has accepted the race conscious aspects of the Remedial Order, has not publicly evaluated whether alternatives might be preferable and more efficacious, and has proceeded to implement the Remedial Order by seeking to acquire the Sites and to thereafter construct public housing on the Sites.

22. Contrary to DHA's implementation of the Court's Order, there are alternative and less intrusive means by which to remedy the vestiges of discrimination found by the Court. Specifically, Section 8 certificates and vouchers, which are already being utilized as the principal relief in the Remedial Order, are a less intrusive means for remedying the vestiges of discrimination. In addition to being less intrusive, Section 8 certificates and vouchers represent a more effective and more flexible way in which to remedy the vestiges of discrimination. Indeed, Section 8 units provide the recipients with greater flexibility in terms of the location of and the amenities provided by the unit, and also provide greater flexibility in terms of providing recipients with the ability to move as the recipient's needs change. Similarly, Section

8 units are more effective than construction of new public housing units because they: (i) impose a less severe financial burden on the government, (ii) require less judicial supervision and administration, (iii) can be implemented more rapidly than new public housing units can be constructed, and (iv) reduce the risk of perpetuating slum conditions and attendant social problems in the new public housing units – problems that are recited in detail in the Walker Case. *See* Walker III, 734 F. Supp. at 1266-69. And, Section 8 units have a less severe impact on the rights of third parties such as Plaintiffs in that DHA's conduct in acquiring and constructing public housing on the Sites has and will permanently diminish the value of Plaintiffs' property. In addition to this decline in property value, the construction of public housing on the Sites will cause increased population density, will create or increase environmental problems, and interfere with the aesthetic values of the existing neighborhoods.

23. Another alternative and less intrusive remedy is to require DHA to utilize the section 8 program[5] in a non-race conscious manner by providing Section 8 certificates and vouchers without any limitations concerning where they can be used or the race of the persons who will be allowed to use them. There has been no showing that such a color blind use of the Section 8 remedy would not be an equally effective and less intrusive way in which to

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[5] Indeed, if Section 8 were viewed by the Court to be an imperfect remedy, the Court could fashion its own remedy to provide recipients of housing assistance with effective "vouchers" or "certificates" to find appropriate and acceptable private housing on their own.

remedy the vestiges of discrimination found by the Court.

24. Yet another alternative and less intrusive remedy is to require DHA to select and acquire sites for the construction of public housing in a non-race conscious manner, and to similarly select tenants for those units in a non-race conscious manner. There has been no showing that such a color blind use of the public housing remedy would not be an equally effective and less intrusive way in which to remedy the vestiges of discrimination found by the Court.

IV.

Summary of Claims[6]

25. In the Walker Case, the Court found that there was a history of discrimination against minorities on the part of DHA, the City of Dallas and HUD. Plaintiffs in this case do not challenge the Court's finding of past discrimination. To the contrary, the challenge that Plaintiffs present in this lawsuit accepts the Court's finding of past discrimination.

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[6] Plaintiffs have not, at this stage of the litigation, joined the United States Department of Housing and Urban Development ("HUD") as a party to this suit. However, if Plaintiffs later learn that HUD has authorized funding for the acquisition and construction of public housing on the Sites, Plaintiffs intend to join HUD as a party to this lawsuit on the grounds that HUD's actions would, in concert with DHA, deprive Plaintiffs of their rights under the Fourteenth Amendment to the United States Constitution.

26. Rather than challenging the finding of past discrimination, this lawsuit challenges the propriety of the remedy chosen by the Court, and sought to be applied by DHA, in redressing past discrimination. In brief, the portion of the Remedial Order pursuant to which DHA is seeking to construct new public housing complexes in predominantly white areas is improper under established federal constitutional standards because it is neither the most effective and flexible way in which to remedy past discrimination, nor is it the least intrusive remedy with respect to the impact that the remedy will have on the rights of innocent third parties such as Plaintiffs.

27. Both the Court and the parties in the Walker Case have acknowledged the existence of an alternate and preferable method by which to remedy the vestiges of discrimination. Specifically, the Court has already accepted Section 8 vouchers and certificates as a viable alternative to remedy the vestiges of past discrimination. Indeed, the overwhelming majority of the relief ordered by the Court, more than seventy percent (70%), is in the form of section 8 vouchers and certificates. *See* Remedial Order Affecting DHA (ordering 2,033 Section 8 vouchers and certificates, as compared with only 774 public housing units). Similarly, the Court has explicitly recognized "the applicants and residents stated preference for Section 8 units" in the context of urging DHA to "devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at least part of the future allocation of new public housing in predominantly white areas." *See* Remedial Order Affecting DHA at ¶ A.7. *See also* Remedial Order Affecting HUD at § A.6 (same). DHA has ignored this plea by the

Court to accept the applicants' and residents' preference for section 8 units.

28. Given the bias in favor of Section 8 units that exists in the current Remedial Order, the parties' stated preference for Section 8 units, the increased efficacy and flexibility of Section 8 units, and the decreased impact that such units would have on innocent third parties such as Plaintiffs. DHA should not construct new public housing in predominantly white areas, as mandated by the Court's Remedial Order. That is not to say, however, that section 8 units should not be utilized in predominately white areas. To the contrary, Plaintiffs do not challenge the propriety of that portion of the Remedial Order that requires DHA to provide section 8 units in predominantly white areas. Indeed, Plaintiffs welcome such a use of Section 8 units as a more narrowly tailored way in which to remedy the vestiges of discrimination that the Court found in the Walker Case.

29. In the alternative, to the extent that the evidence adduced at the trial of this case demonstrates a color blind use of the Section 8 program would equally serve to remedy the vestiges of discrimination, Plaintiffs would not challenge such a remedy. Indeed, to the extent that a color blind remedy would serve to eradicate the vestiges of discrimination, Plaintiffs assert that such a remedy would be preferable and constitutionally required. In advocating such a color blind remedy, however, Plaintiffs do not challenge the Court's finding of past discrimination, nor do they challenge the Court's authority to remedy that discrimination.

V.

Causes of Action

A. Violation of Civil Rights Pursuant to Section 1983

30. Paragraphs 1 through 29 are incorporated herein by reference as though fully restated.

31. By the actions described herein, DHA has violated Plaintiffs' constitutional rights under the 14th Amendment to the United States Constitution. Specifically, DHA has selected the two Sites based largely, if not solely, on the racial composition of the surrounding neighborhood. Moreover DHA has announced an intention, pursuant to the Remedial Order, to select tenants to occupy this site based on a race-conscious tenant selection method. Both actions involve an impermissible distinction between citizens solely because of their race, and such actions are not the least intrusive or the most narrowly tailored remedy available to remedy the vestiges of discrimination found by the Court in the Walker Case.

32. These actions on the part of DHA have been undertaken under the color of state and/or federal law, and have deprived Plaintiffs of their federal constitutional right to equal protection under the Fourteenth Amendment of the United States Constitution.

33. As a direct result of this violation, Plaintiffs have suffered, and will continue to suffer, damages. This damage has and will permanently affect that value of Plaintiffs' property.

34. In addition, Plaintiffs have been forced to retain the services of the law firm of Lynn Stodghill Melsheimer & Tillotson, L.L.P., 1717 Main Street, Suite 3660, Dallas,

Texas 75201, and the undersigned to prosecute this action. Plaintiffs have promised to pay a reasonable fee for such services through trial and all appeals for which Plaintiffs have suffered damages in an amount in excess of the minimum jurisdictional limits of this Court. DHA should be required to pay these fees.

B. Declaratory Judgment.

35. Paragraphs 1 through 34 are incorporated herein by reference as though fully restated.

36. There exists between Plaintiffs and DHA an actual controversy as to whether DHA's announced intention to acquire the Sites and to thereafter construct and operate public housing on the Sites, is in violation of Plaintiffs' rights under the 14th Amendment to the United States Constitution. Pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiffs request that the Court render a judgment declaring that the following actions on the part of the DHA are in violation of Plaintiffs rights under the Fourteenth Amendment to the United States Constitution:

a. DHA's intention and efforts to acquire the Sites;

b. DHA's acquisition of the Sites;

c. DHA's plan to construct public housing on the Sites; and

d. DHA's construction of public housing on the Sites.

These actions on the part of DHA are in violation of Plaintiffs' rights under the 14th Amendment to the

United States Constitution because the actions of the DHA are based on distinctions made on the basis of race and are not the least intrusive or most narrowly tailored remedy available to remedy the vestiges of discrimination found by the Court in the Walker Case.

37. In addition, Plaintiffs request an award of its reasonable and necessary attorneys' fees in connection with this declaratory judgment, as provided by 28 U.S.C. §§ 2201 and 2202.

C. Application for Injunctive Relief

38. Paragraphs 1 through 37 are incorporated herein by reference as though fully restated Plaintiffs seek relief hereunder pursuant to Rule 65 of the Federal Rules of Civil Procedure and respectfully show as follows:

a. As shown above, the Court has entered a Remedial Order Affecting DHA that is race conscious. DHA has not appealed the Order, and has publicly stated its intention to comply with the order, pursuant to which it has initiated efforts to acquire the Sites and to thereafter construct public housing in predominantly white areas of Dallas which are located in close proximity to Plaintiffs' property.

b. If the Order is left standing and DHA is not enjoined, DHA will acquire the Sites and will begin its efforts to construct public housing in predominantly white areas of Dallas, which are located in close proximity to Plaintiffs' property, thus causing Plaintiffs to suffer immediate and irreparable harm

for which there is no adequate remedy at law. Specifically, DHA will begin construction of public housing units pursuant to a race-conscious law or policy in violation of the Fourteenth Amendment to the United States Constitution, with such construction permanently affecting the character of the neighborhood, and value of Plaintiffs' property.

c. The only adequate relief under the circumstances is a Temporary Restraining Order, for which Plaintiffs now sue, enjoining and restraining DHA from acquiring the Sites or, in the alternative, from constructing public housing on the Sites.

d. Plaintiffs also seek and are entitled to a preliminary and permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure because:

(1) Plaintiffs are entitled to the relief demanded above and such relief requires that the DHA be restrained from acquiring the Sites and constructing public housing on the Sites;

(2) DHA has indicated its intent to adhere to the terms of the Remedial Order, despite the fact that it is constitutionally overbroad;

(3) Plaintiffs are entitled to a writ of injunction under the principles of equity; and

(4) Irreparable injury to Plaintiffs will occur irrespective of any remedy at law

e. Plaintiffs therefore request that the temporary restraining order in this case be converted to a preliminary injunction during the pendency of this action and, upon final trial, a permanent injunction.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray judgment of the Court that DHA be enjoined from purchasing the Sites or, in the alternative, that it be enjoined from constructing public housing on the Sites; that a temporary restraining order be issued as requested and set forth in Section "C" above; that upon final trial, a permanent injunction be issued as requested above; and for such other and further relief to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

LYNN, STODGHILL, MELSHEIMER & TILLOTSON, L.L.P.

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VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared DAVID BEER, who being first duly sworn, upon his oath stated that he is the duly authorized representative for Highlands of McKamy IV and V Community Improvement Association; that he has read the above and foregoing Plaintiff Original Complaint and Request for Injunctive Relief; that he has personal knowledge of the factual statements relating to Plaintiffs' property, DHA's intention to purchase the Sites and construct public housing on them, and the effect of such action on the value of Plaintiffs' Property, and that those factual statements are true and correct.

/s/ David Beer
DAVID BEER

SUBSCRIBED AND SWORN TO BEFORE me on this the 3rd day of July, 1996 to certify which witness my hand and official seal.

/s/ Rhonda K. Polvado
Notary Public, State of Texas

/s/ Rhonda K. Polvado
Typed or Printed Name

Commission Expiration: 01-25-2000

[SEAL] RHONDA K. POLVADO
NOTARY PUBLIC
State of Texas
Comm. Exp. 01-25-2000

FILED
DEC 30 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-296

In The

Supreme Court of the United States

DEBRA WALKER, et al.,

Petitioners,

v.

CITY OF MESQUITE, TX, et al.,

Respondents.

On Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS IN RESPONSE TO HOMEOWNERS' OPPOSITION

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Reply Brief for Petitioners in Response to Homeowners' Opposition

After having waived their right to reply to the petition, the respondent Homeowners were directed by the Court to respond. The Homeowners now spend 30 pages seeking to defend the decision below. But that attempted defense only underscores the errors committed by the Fifth Circuit and the need for review by this Court.

1. The Homeowners' strongest defense of the Fifth Circuit ruling is that the appeals court properly exercised its discretion and balanced all the relevant factors in a manner that this Court should not disturb. For example, on page 17 of their opposition, the Homeowners state that "Petitioners have pointed to no evidence that would show that the Fifth Circuit abused its discretion in reaching this conclusion." The Homeowners' brief has an entire section of argument captioned "The Fifth Circuit Decision Correctly Balanced the Rights of the Competing Parties in Accordance with the Standards Established by this Court." Homeowners' Brief pages 20-24.

But that defense is, in effect, an admission that at least one of the grounds upon which the petition seeks review is justified – the Fifth Circuit overstepped its proper role and substituted its judgment for the district court's exercise of discretion. The exercise of remedial discretion and the balancing of interests is the job of the district court, not the court of appeals. *U.S. v. Paradise*, 480 U.S. 149, 184 (1987).

2. The Homeowners criticize the district court for adopting the written findings of fact proposed by the

petitioners. In addition to the written findings, the district court entered extensive oral findings and conclusions into the record of the case. App. 36a-65a. The Homeowners do not even claim that those 30 pages of oral findings and conclusions are not the product of the district court's independent review of the facts and arguments in the case. These oral findings alone would have been sufficient to support the district court's ruling. Fed. R. Civ. P. 52(a). Neither the oral nor the written findings of fact were overturned by the Fifth Circuit. App. 20a, App. 24a.

The district court's written opinion pointed out that many of the statements of fact are from stipulations of fact between the Homeowners and petitioners or from the statements of fact in the petitioners' motion for summary judgment which the district court found were established by the evidence cited in support of those statements. App. 72a n. 9. It should not be surprising to find extensive reliance on such stipulated or otherwise undisputed statements of fact in findings for a case as convoluted and complex as this one. App. 3a. The presence of such statements does not show any abdication of the district court's authority or discretion. *Anderson v. City of Bessemer*, 470 U.S. 564, 572-573 (1985); *American River Trans. Co. v. Kavokaliakra SS*, 148 F.3d 446, 448 (5th Cir. 1998).

3. The homeowners argue against granting certiorari on the grounds that the HUD site selection regulation is not directly at issue and that "There is nothing in the Fifth Circuit's decision which prohibits race-based site selection that results from voluntary agreements entered into between HUD and local housing agencies

outside of the context of court-ordered desegregation" Homeowners' Brief page 7.

Petitioners do not argue that the constitutionality of the HUD public housing site selection regulation, 24 CFR § 941.202(c) was expressly decided by the Fifth Circuit. Their argument is rather that the Fifth Circuit decision calls into question the national policy favoring the use of race-conscious public housing site selection criteria upon which that regulation is based and this Court should resolve this issue of great public importance. Pet. 9-13.

The Homeowners' argument that the Fifth Circuit decision does not reach voluntary, agreed, site selection decisions between HUD and local housing authorities is contradicted by the record in this case. There is such an agreement between HUD and the local housing authority on site selection for the very units at issue. The challenged sites were submitted by DHA to HUD for approval under the site selection regulation. HUD approved the sites under the site selection regulation. App. 104a, 104a n. 117, 118. The agreement under the site selection regulation and process has not protected the site selection decisions from the Fifth Circuit's constitutional attack. The implementation of this DHA site selection submission and HUD's approval of the sites is still enjoined by the Fifth Circuit's stay of construction. App. 35a.

4. The Homeowners also seek to defend the Fifth Circuit's ruling on the grounds that its approach to the use of race-conscious remedies is tentative and will not preclude the consideration of race in fashioning remedies at a future stage of the case. Homeowners' Brief page 13.

While one statement in the opinion does suggest that future race-conscious site selection may be justified, App. 34a, the consistent message of the decision is that the prohibition on race-conscious site selection is absolute and unqualified:

> "Additionally, it is unnecessary to employ the race-conscious site selection criterion ordered by the court even if new construction or acquisition of public housing occurs. The district court may proceed with new construction as part of his remedial plan, but he may not do so using a race-conscious site selection criterion." App. 27a.

> "Because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, the provision of the court's remedial order calling for the construction or acquisition of units of public housing in 'predominantly white' areas is unconstitutional." App. 34a.

> "Third, this opinion does not preclude the construction or acquisition of additional public housing if sites are selected by means of nonracial criteria." App. 34a.

The Fifth Circuit's prohibition is certainly absolute with respect to the current allocation of public housing units waiting to be used and including the units proposed for the Homeowners' area.

> "As discussed previously, the district court may entertain any number of site selection criteria regarding new public housing units, except for race. No one suggests that the 474 units should not be built, only that requiring that they

be built using a race-conscious site selection criterion is not narrowly tailored." App. 32a.

If these units are built under the Fifth Circuit decision, the sites cannot be chosen using a race-conscious site selection standard.

For the foregoing reasons and those stated in the petition, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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